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Page.	*Line.*	*for*	*read*
316	3 & 5	1925	1927
581	footnote (2) reference omitted is L. R. 8 Ch. 650.		
616	headnote 1	December 1926	May 1921
682	delete lines 5 and 6, and "*to the plaintiffs*" on line 7, and read: "The defendants, becoming liable as lessees to pay to the plaintiffs, in whom the reversion of the lease of November 30, 1908, was then vested,"		
720	last	after 1926 read "under s. 268 of the Companies Act, 1908, now replaced by s. 338"	

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re SIMMS.

Ex parte TRUSTEE.

C. A.

1933

July 12, 13, 14, 17, 25.

Bankruptcy—Sale by Debtor of Business to Company—Subsequent Bankruptcy of Debtor—Issue of Debentures by Company—Appointment of Receiver by Debenture Holders—Pending Contracts completed by Receiver—Sale of Business to Company subsequently set aside as fraudulent at instance of Trustee in Bankruptcy—Election by Trustee to treat Receiver as trespasser—Liability of Receiver to account to Trustee—Claim by Trustee for Damages for Conversion or for Money had and received—Special Damages for Conversion.

On Jan. 9, 1929, S., a builder, assigned his business and assets to a limited company in consideration of shares in the company. On Jan. 14, 1929, the company issued debentures charged on its assets and undertaking. On Feb. 14, 1929, a receiver was appointed by the debenture-holders. On May 23, 1929, S. was adjudicated a bankrupt and on May 27, 1929, a trustee in bankruptcy was appointed. On April 15, 1930, an order was made by Clauson J. upon a motion by the trustee against the company and the debenture holders declaring that the assignment of Jan. 9, 1929, was fraudulent and void and an act of bankruptcy and that the assets of the bankrupt purported to be thereby assigned formed part of his estate and vested in the trustee for the benefit of his creditors; and the company was ordered to deliver up to the trustee or to account to him for such of the assets as had come to the hands of the company or of any person by the order or for the use of the company: see *In re Simms* [1930] 2 Ch. 22.

The receiver on taking possession converted to his own use chattels of the bankrupt consisting of plant and machinery, motor vans and office

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SIMMS,
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TRUSTEE,
Ex parte.

furniture and carried on the bankrupt's business of a builder, in the course of which he completed a number of current building contracts and received payment thereunder from the building owners.

On Dec. 23, 1931, the trustee elected to treat the receiver as a trespasser and claimed that the receiver (who by leave of the Court was made a respondent to the motion of the trustee in place of the debenture-holders) by so taking possession, intermeddling with or trespassing on the assets, contracts and possessory rights which passed to him was a trespasser and/or guilty of conversion and/or interference with the trustee's contractual rights and was liable in damages for the value of all the assets and for the net moneys paid by the building owners under the building contracts as money had and received to his use. The receiver did not dispute his liability to account to the trustee for the sum of 2600*l.*, the value of the chattels which he had converted to his use, but resisted the trustee's claim to recover as damages for their conversion a sum equal to the profits that would have accrued to him from the building contracts but for the acts of the receiver.

Held (reversing the decision of Clauson J.), that the trustee having elected to treat the receiver as a wrongdoer in completing the contracts was not entitled to treat the contracts as having been kept alive for his benefit or to call upon the receiver to account for the profits realized by such completion as special damages for conversion or as damages for wrongfully intermeddling with the contracts between the bankrupt and the building owners.

Held, also (affirming the decision of Clauson J.), that the profits made by the receiver on the contracts completed by him could not on the facts of the case be treated as money had and received to the use of the trustee.

Ex parte Vaughan (1884) 14 Q. B. D. 25 approved.

Dictum of Phillimore J. in *In re Goldburg* (No. 2) [1912] 1 K. B. 606, 611, that a receiver, in a case like the present, cannot set up a claim for anything that he has usefully done, dissented from.

APPEAL from a decision of Clauson J.

The material facts are fully stated in the judgment of the Master of the Rolls and were shortly as follows:

The bankrupt, Frederick Simms, was towards the end of 1928 carrying on the business of a builder under the style of "William Simms." On Jan. 9, 1929, he assigned his business and assets to a limited company named "William Simms Ld." formed to carry on the business in consideration of shares in the company. On Jan. 14, 1929, the company issued to Lloyds Bank debentures charged on its assets and undertaking. On Feb. 14, 1929, Sydney Harold Gillett was appointed receiver by the debenture holders and on the same day he went into possession. On May 23, 1929, Simms was adjudicated a bankrupt and on May 27, 1929, a trustee in bankruptcy was appointed. On April 15, 1930, an order was made by Clauson J. upon a motion by the trustee against the company and the debenture holders declaring that the assignment of Jan. 9, 1929, was fraudulent and void and an act of bankruptcy and that the assets of the bankrupt purported to be thereby assigned formed part of his estate and vested in the trustee for the benefit of his creditors ; and the company was ordered to deliver up to the trustee or account to him for such of the assets as had come to the hands of the company or of any person by the order or for the use of the company : see *In re Simms.* (1)

The receiver on taking possession converted to his use chattels of the bankrupt consisting of plant and machinery, motor vans and office furniture and carried on the bankrupt's business of a builder, in the course of which he completed a number of current building contracts that had been entered into by the bankrupt and received payment thereunder from the building owners.

In adjusting the liability of the receiver to the trustee, questions arose as to proper principle to be applied, and, on Dec. 23, 1931, the trustee definitely elected to treat the receiver as a trespasser and the receiver agreed to the trustee's claims being dealt with on that footing. The trustee claimed that the receiver (who by leave of the Court was made a respondent to the motion of the trustee in place of the debenture holders) by so taking possession, intermeddling with or trespassing on the assets, contracts and possessory rights which passed to him, was a trespasser and/or guilty of conversion and/or interference with the trustee's contractual rights and was liable to him in damages for the value of all the assets and in damages for trespass and was liable to him for the net moneys paid by the building owners under the building contracts as money had and received to his use. The receiver did not dispute his liability to account to the trustee for the sum of 2600*l.*, the value of the chattels which he had converted to his use, but resisted the trustee's claim to recover as damages for their conversion a sum equal to the profits that would have accrued to him from the building contracts, but for the acts of the receiver and that the measure of such damages was 5600*l.*, representing the net profit the receiver realized under the contracts after deducting from the gross amount received by him the costs of completing the same.

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(1) [1930] 2 Ch. 22.

Clauson J. held (1.) that according to the rights subsisting between the bankrupt and the building owners under the building contracts (assuming that those rights could be treated as rights of the trustee, under the doctrine of relation back) the bankrupt had not possession of the building sites which was essential to qualify him as plaintiff in an action " quare clausum fregit " ; (2.) that the receiver had committed no tort known to the law in having interfered with the contractual rights subsisting between the bankrupt or, by relation back the trustee, and the building owners ; (3.) that the receiver committed a tort by taking possession of and converting to his own use the plant and other chattels and was liable to pay to the trustee for such conversion the sum of 5600*l.*, being the net profit which the receiver realized, in addition to the 2617*l.* the value of the chattels for which the receiver admitted liability ; (4.) that the gross sum of 13,263*l.* received by the receiver for completing the contracts of the bankrupt was not money had and received for the use of the trustee, that sum never having belonged to the trustee who could have sued the building owners only on the footing of having adopted the receiver's work as his own.

The receiver appealed from so much of the order of Clauson J. as declared that the receiver was liable to pay the further sum of 5600*l.* 4*s.* 10*d.* beyond the sum for which liability was admitted. The appeal was heard on July 12, 13, 14 and 17, 1933.

Gavin Simonds K.C. and *Harold Christie* for the appellant receiver. The trustee in bankruptcy having elected to treat the receiver appointed by Lloyds Bank as a trespasser between Feb. 14, 1929, the date of his appointment and Feb. 28, 1929, the date of Clauson J.'s judgment in *In re Simms* (1), the

(1) [1930] 2 Ch. 22.

question to be determined is what is the measure of damages for taking possession of the business and carrying out current contracts and entering into new contracts. It is contended that Clauson J. has assessed the damages on a wrong footing. The measure of damages is that laid down in *Ex parte Vaughan* (1) and the receiver's duty is to deliver up all the property of which he took possession and which remains in his hands unconverted and to pay the value of the property converted: see also *In re Goldburg* (No. 2). (2)

D. N. Pritt K.C. and *Tindale Davis* for the respondent trustee in bankruptcy. The present case must be dealt with on the footing that the receiver was a transgressor from the first.

[LORD HANWORTH M.R. referred to *Hambly* v. *Trott*. (3)]

If the receiver wishes to bring into account the loss he has made on the three unprofitable contracts in reduction of damages, he must show some cause of action entitling him to do so. It is conceded that the receiver can bring into account money laid out by him in carrying out the profitable contracts including overhead and jobbing charges. The trustee in bankruptcy was free to adopt the whole of the receiver's transactions treating him as his agent or to claim damages against him as a trespasser. In the latter case he can claim piecemeal against him and say he will claim against him for 20 only of the 23 separate contracts and allow the expenditure in respect of those contracts only.

[LAWRENCE L.J. After full knowledge of the facts the trustee elected to treat the receiver as a wrongdoer. How can he afterwards say he will adopt some of the contracts?]

Any remedy arising out of the facts is available to the trustee so long as it does not involve his adopting the trustee as his agent for the whole business. He can at the same time sue for money had and received to his use and for conversion of the plant, etc. The trustee may bring an action for money had and received without adopting the receiver as his agent. At the most he would only be adopting the particular

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(1) 14 Q. B. D. 25.

(2) [1912] 1 K. B. 606.

(3) (1776) 1 Cowp. 371.

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SIMMS, *In re.*
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transaction: see *In re Goldburg* (No. 2) (1), where in similar circumstances a receiver who was treated as a trespasser was made to account for assets of the bankrupt come to his hands including book debts collected by him.

Clauson J. has held the receiver to be liable to account for the profits which the bankrupt would have made if he had carried on the business. It is for that reason that the receiver can be made liable in respect of new contracts entered into by him.

[LORD HANWORTH M.R. referred to *Buckland* v. *Johnson*. (2)]

The trustee is entitled to sue the receiver as trespasser for money had and received: Bullen & Leake's Precedents of Pleadings, 3rd ed., pp. 47, 48; and by suing thus in respect only of particular contracts, the trustee is not waiving the tort: compare *Burn* v. *Morris* (3) and *Rice* v. *Reed*. (4)

[LAWRENCE L.J. If the receiver has not received the sums due under the contracts on the trustee's behalf or with his authority, why cannot the trustee recover those sums from the debtors?]

It may be that he could, but that does not prevent him from recovering the payments from the receiver as money had and received: *Andrews* v. *Hawley*. (5)

[LORD HANWORTH M.R. referred to *Sinclair* v. *Brougham*. (6)]

Although the receiver is being treated as a transgressor, the trustee is entitled to any remedy that may be used against a tortfeasor including the action for money had and received: *Smith* v. *Baker*. (7)

Again, although the ordinary measure of damages in cases of trover and conversion is the value of the goods and nothing more, there are cases which show that the profits made on chattels converted can be recovered as special damages. This is precisely a case where that principle should be applied. The position is made more difficult by the artificiality of the rule which relates back the title of the trustee in bankruptcy.

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(1) [1912] 1 K. B. 606.
(2) (1854) 15 C. B. 145.
(3) (1834) 2 Cr. & M. 579.
(4) [1900] 1 Q. B. 54.
(5) (1857) 26 L. J. (Ex.) 323.
(6) [1914] A. C. 398, 415, 454.
(7) (1873) L. R. 8 C. P. 350, 355.

In fact at the material time the trustee could not have intervened and used the goods, as he did not exist, and the matter has therefore to be dealt with on a notional footing. It is not therefore like the case of a man who has had his tools taken and can replace them next day but like that of a man who has been dispossessed of premises and has been deprived of his whole business. In the latter case damages can be recovered not only for conversion but for profits lost through the conversion: see *Davis* v. *Oswell* (1); *Bodley* v. *Reynolds* (2); *Spanish & Portuguese Screw Steam Shipping Co.* v. *Bell* (3); *France* v. *Gaudet.* (4)

[LAWRENCE L.J. I can understand a man being given special damages in respect of a benefit he would have obtained if he had been able to use the goods taken from him. But here if the receiver had not carried on the business the trustee could not have done so, for he had not then been appointed.]

[ROMER L.J. If I am to imagine the trustee as capable of carrying out the contracts, I must also imagine him as capable of buying plant to do so.]

That might be an answer if only plant had been taken by the receiver. But he undertook the actual contracts also and carried them out. The trustee is entitled therefore as damages to the profits on those contracts.

It was said on behalf of the receiver that in view of the gap between the time when the company took possession and the time when the receiver was appointed, there was nothing to show that any part of the goods taken by the receiver belonged to the bankrupt. If so, it was for the receiver to establish this. Further in the amended points of defence the receiver admitted the conversion of certain specified goods and it was the use of these which earned the profits in question.

The trustee has also claimed against the receiver on the ground of interference with contracts. The tort is to persuade any one to commit a breach of contract: Pollock on Torts, 13th ed., pp. 340, 572. The receiver is really in a dilemma.

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(1) (1837) 7 C. & P. 804.
(2) (1846) 8 Q. B. 779.
(3) (1856) 25 L. J. (Q. B.) 148.
(4) (1871) L. R. 6 Q. B. 199.

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He must decide what he was doing when he entered on the contracts belonging to the trustee. When it is said that he has interfered with the trustee's contracts, he says that on the contrary he was engaged in fulfilling them; but when the trustee claims against him for money had and received, he sets up the case that he is a tortfeasor. That is the dilemma. Either the receiver was dealing with the contracts as the trustee contends, in which case he has collected the trustee's money; or he was going to the building owners and seeking to contract with them in the place of the trustee, in which case he has been persuading them to commit breaches of contract and is liable in tort. Further, the receiver did it with full knowledge of the facts and as knowledge of the law must be imputed to him, he must be treated as having committed the tort knowingly.

[They also referred to *In re Gunsbourg* (1); *Powell* v. *Rees* (2); *Phillips* v. *Homfray* (3); *John* v. *Dodwell & Co.* (4); MacSwinney on Mines, 5th ed., p. 318, S. 114.]

[LORD HANWORTH M.R. referred to *Thomson* v. *Harding*. (5)]

Gavin Simonds K.C. in reply.

[LORD HANWORTH M.R. We do not wish to hear you on the question of interference with contracts. What we wish you to deal with is the measure of damages for conversion and the right of the trustee to claim for money had and received.]

With regard to damages for conversion, it is alleged that the receiver took possession of assets of the bankrupt remaining in the possession of the company at the time he went into possession and that in respect of that conversion the trustee has suffered damages beyond the value of the goods. The allegation is of special damage beyond the value of the goods, but special damage must be pleaded and strictly proved. The points of claim here contain no allegation of special damage nor has there been evidence adduced to prove any. The special damage now alleged is said to result from the trustee's being prevented from earning profits, but there is no allegation of this in the pleadings. In any case the doctrine of relation back is a difficult one, for how could it be said that the trustee was precluded from earning profits ? If he is to be treated as in existence at the material time, how was he prevented from earning profits ? and, if not, he can have no claim. The common sense view of it is that the receiver by taking possession and fulfilling the contracts saved every one concerned from a substantial claim for damages.

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(1) [1920] 2 K. B. 426.
(2) (1837) 7 Ad. & E. 426.
(3) (1883) 24 Ch. D. 439, 461.
(4) [1918] A. C. 563.
(5) (1853) 2 E. & B. 630.

There is no evidence that 5600*l.* would have been earned by the trustee but for the conversion of assets ; and those are not damages directly flowing from the conversion.

With regard to the claim for money had and received, the trustee intimated in his letter that he elected to treat the receiver as a trespasser and it is not now open to him to approbate and reprobate. The reprobation was to the carrying on by the receiver of the business as a whole. There must be either approbation or reprobation as a whole : *Ex parte Vaughan.* (1)

[LORD HANWORTH M.R. The decision in that case is not so clear as I could wish.]

The trustee had an opportunity of treating the receiver as his agent. He declined to do so and elected to treat him as a tortfeasor. He must therefore establish the torts which he alleges in his points of claim. The trustee has abandoned his claim for trespass, and the claim for intermeddling with contracts has now gone. He cannot now change his ground and sue for money had and received. The trustee must establish that the receiver is tortfeasor, otherwise he fails in limine.

[LAWRENCE L.J. referred to *Davis* v. *Petrie.* (2)]

An action for money had and received does not here lie because it would be inconsistent with the election made by the trustee.

A trustee de son tort is in the same position as an ordinary trustee and is entitled to the same allowances.

Having regard to the form of these proceedings and to the fact that the trustee, having elected to treat the receiver as a tortfeasor and having failed as to two of the three torts alleged, he cannot now turn round and, as to the two torts in respect of which he has failed, claim for money had and received.

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(1) 14 Q. B. D. 25, 30.

(2) [1906] 2 K. B. 786.

If however the receiver is wrong on this point then it is submitted that, on the facts, no action for money had and received will lie. There was at no time any money due to the bankrupt in respect of these contracts. The money became due subsequently owing to the exertions of the company and the receiver. The bankrupt abandoned the contracts, and the receiver pledged his own credit in order to enable the profits to be earned. The first condition therefore of an action for money had and received was not fulfilled because there was no money owing to the bankrupt.

Cur. adv. vult.

July 17. The following judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from a decision of Clauson J., under which he found that there was a liability on the receiver in a sum of 5600*l.* The figures which left that sum as the true amount which Clauson J. thought was payable by the receiver are somewhat intricate and are bound up with the facts of the case, which must be stated in some little detail. Simms was a man who carried on business as a builder. On January 9, 1929, he sold his business to a limited company in return for shares, which were handed to him as payment for the transfer of the business. On January 14, 1929, the company issued debentures to Lloyds Bank charged on the goodwill and undertaking and all the assets of the company. The business of the company did not prosper and on February 14 of the same year Gillett was appointed receiver by the debenture holders and he took possession of the premises and of everything as receiver. On March 8 a petition in bankruptcy was presented against Simms and on May 23, 1929, he was adjudicated a bankrupt.

The trustee in bankruptcy, after examining the affairs of Simms, came to the conclusion that the sale by Simms of his business to the company was a fraudulent transfer, a transfer in fraud of his creditors, and he took steps to have that declared.

On February 28, 1930, an oral judgment was given by Clauson J. holding that the sale on January 9, 1929, was a fraudulent transfer and an act of bankruptcy and that the whole of the assets thus transferred were distributable among Simms' creditors. (1) The actual order to that effect was drawn up on April 15, 1930.

Matters proceeded and the trustee who was appointed in the bankruptcy communicated with the receiver with a view to obtaining from the receiver the assets of which he had taken possession on February 14, 1929. It will be observed that there was an interval between January 9, 1929, and February 14, when the receiver took possession, during which the business was carried on in name, at any rate, by the limited company. In the course of the negotiations the receiver was satisfied that he would have to make a payment over to the trustee and in May, 1931, he paid 1000*l.* to the trustee on account of his indebtedness, whatever it might turn out to be.

After some legitimate efforts between the parties, during which the receiver, as Clauson J. has found, gave every possible assistance that he could to the trustee, it was found impossible between them to adjust the accounts and ultimately, by a letter of December 23, 1931, the trustee wrote and said that he elected to treat the receiver as a trespasser. It is of great importance to emphasize this election by the trustee in bankruptcy.

There was ultimately a notice of motion which was issued on May 5, 1932. That notice of motion should be mentioned now, for it sought a declaration on behalf of the trustee that, having regard to the order of April 15, 1930, the respondents to that notice of motion, Gillett by amendment being one of them, " are accountable to the trustee for the assets of the bankrupt passing to the trustee by virtue of the said order and received and dealt with by them or their servants or agents." and, secondly, as the trustee proposes to treat the respondents, William Simms, Ld., and the receiver, " as trespassers in respect to the goods and chattels so dealt with by them they are accountable

(1) [1930] 2 Ch. 22.

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for the goods and chattels so seized and dealt with by them regardless of any loss incurred by them or their agents in furtherance of their dealings with the said chattels and assets." It will be observed, therefore, that as and from December 23, 1931, emphasized as that act is by what I have just read, the trustee elected to treat the receiver as a trespasser.

I must now proceed to give some of the figures by which Clauson J. came to the conclusion that 5600*l.* was due from the receiver. The receiver's solicitors on January 11, 1932, admitted liability for a sum of 2337*l.* 11*s.* 11*d.*, but that figure really is not one about which we need trouble much.

The notice of motion of May 5, which I have read, was given in 1932 and under that the trustee in bankruptcy claimed a sum of 21,993*l.* In his judgment the learned judge says: "To this evidence Gillett replied by an affidavit sworn on June 29, 1932, dealing with the whole of the circumstances of the case with some elaboration, and submitting that he was liable to account only for such of the assets of William Simms which passed to the company under the contract of sale of January 9, 1929, as actually came into his hands on or after February 14, 1929. He further submitted that, as the trustee had elected to treat him as a trespasser, he was under no obligation to account to him in respect to any of the contracts which were pending and uncompleted on February 14, 1929, in respect whereof nothing was then due and nothing would become payable until further work had been done and materials had been supplied in accordance with the terms of the various contracts. Gillett further pointed out that he was an agent of the company and not of the bank and suggested that the bank had not received or dealt with, either by itself or by its servants or agents, any of the assets of the bankrupt which passed to the trustee." In putting that claim of the receiver into terms of money he admitted (*a*) that he would be liable for the proceeds of chattels which were traced to his hands and (*b*) the proceeds of book debts received by him, including some retention money, which would reach his hands by mere lapse of time, but he contended that he was not liable in respect

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of moneys which came to his hands out of contracts which were pending at the time when he took possession and, indeed, at the time when the company was formed and which arose only after further work had been done in respect of them and further lapse of time had occurred.

Ultimately on October 13, 1932, points of claim and defence were delivered. The trustee claimed the sum of 11,507*l.* 4*s.* 1*d.*, but he was prepared to admit as a deduction from that certain expenses of what has been called jobbing—a sum of 3409*l.* The receiver admitted a liability in respect of the following matters. There were, at the time when he took over, a total of twenty contracts which were uncompleted. There were three contracts which are marked by this, that they ended in a loss; and there were seven contracts which were newly undertaken by the receiver in the course of carrying on the business. The receiver admitted liability in respect of the retention moneys of eight contracts which had been received without his making an expenditure in respect of them and also in respect of five items of plant and machinery, which are to be found in Account A. Those items total a sum of 2617*l.* 3*s.* 3*d.*, including a small sum for book debts; but the receiver repudiated any liability to the trustee in respect of the twenty contracts which he carried to completion and he also claimed that, if there was, as there was, a certain amount of cost of jobbing allowed by the trustee, by parity of reasoning jobbing ought to be allowed and the overhead charges admitted in respect of three contracts upon which there was a loss and upon the seven contracts which were new. In respect of that the claim of the receiver was that upon the jobbing of twenty contracts he ought to be paid a sum of 3289*l.* 16*s.* 0*d.*, and there were losses on the three contracts of 1433*l.* 7*s.* 7*d.*, and the overhead charges on those and jobbing would be 2741*l.* 4*s.*, making a total of 4174*l.* 11*s.* 7*d.* Deducting, therefore, those sums of 4174*l.* and 3289*l.* from the claim of the trustee there was only a balance then due from him of 1425*l.* 13*s.* 3*d.*, and, if that sum be added to the admitted sum of 2617*l.* 13*s.* 3*d.*, the total allowed would be 4042*l.* 16*s.* 6*d.*, in respect of which there had already been a payment of 1000*l.*, leaving 3042*l.* 16*s.* 6*d.* and no more due.

There were amended points of claim and defence delivered and ultimately upon those amended claims of the receiver the case was heard before Clauson J. on April 25, 26, 27 and 28 of this year and he gave judgment on May 24.

The way in which the claim of the trustee was put forward in his amended points of claim was this. He claimed that the receiver and the company were trespassers and/or guilty of conversion and/or interference with the trustee's contractual rights and that both of them were severally liable to him in damages for the value of all the said assets and for damages for their conversion and for damages for trespass and were further liable to him for all moneys paid by the building owners under the building contracts as money had and received to his use.

Clauson J., dealing with the whole matter, said: "A possible way of putting the trustee's case may be to say that the receiver committed a tort on taking possession of the plant, machinery and stock which must be taken to have belonged to the trustee and converting it to his own use, and is accordingly liable in damages for conversion, and that the measure of damages exceeds the actual value of the plant and machinery by the sum of 5600*l.* 4*s.* 10*d.*, because, if the conversion had not taken place, the facts show that the trustee could have obtained 5600*l.* 4*s.* 10*d.* by using the plant, machinery and stock to complete the twenty contracts. I am disposed to think that this ground forms a sound basis for the claim." Later in his judgment he said: "There is, however, another way in which the trustee" puts his claim, namely, a claim for money had and received, and he concluded thus: "I am thus led to the conclusion that, strictly, the trustee cannot recover the 13,263*l.* 13*s.* 0*d.*, or at all events any part of it in excess of the 5600*l.* 4*s.* 10*d.* in an action for money had and received. I do not propose to elaborate the matter further as (as I have already said) I cannot refuse the trustee the right to recover the 5600*l.* 4*s.* 10*d.* as damages for conversion."

Is that conclusion right? It was argued before us by Mr. Pritt that it was right, that he could recover that sum either as damages for conversion or as money had and received by the receiver to the use of the trustee.

I must here say that Mr. Pritt did not seek to establish that he was entitled to damages for interference with the trustee's contractual rights. That was definitely abandoned and the two alternative grounds that were left were either that the trustee could recover this sum as damages for conversion or as money had and received to the use of the trustee.

The authority on which the claim was based was *In re Goldburg* (No. 2). (1) In that case Phillimore J. said (2): "That which the receiver takes possession of, as a trespasser, he must account for, and he cannot set up any claim for anything that he has usefully done. On the other hand, he cannot be charged with any profits that he has made out of the bankrupt's goods. He is merely accountable for those assets of the bankrupt, such as book debts, sovereigns or stock, which are traced to his hands, and he has either to deliver them up or to pay damages for their conversion."

I myself have some difficulty in following the first part of the sentence which I have quoted, that the receiver cannot set up any claim for anything that he has usefully done. I confess that it would appear to me that that sentence goes beyond what was intended by the learned judge or what was needed for the judgment. If it is to be taken simpliciter as it stands, it seems to me to run counter to a number of decisions, to which attention must be paid.

Shortly put, I think that the decision in *Ex parte Vaughan* (3) is one which more accurately states the true liability of the receiver. That case is a decision of the Divisional Court and therefore of higher authority than the decision of Phillimore J. The case is worth a little examination. From the statement of facts it appears that Vaughan took possession of the debtor's shops and property and, with the consent of the committee of inspection, carried on his business and in so doing he made purchases of fresh goods, such as flour and yeast, for the

(1) [1912] 1 K. B. 606. (2) Ibid. 611.
(3) 14 Q. B. D. 25.

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purposes of the business. Ultimately there was an adjudication in bankruptcy. Vaughan "rendered an account to the official receiver which shewed that he had received under the provisions of the deed the sum of 293*l.* 1*s.* 6*d.* This sum was made up of 18*l.* 18*s.*, 'cash in hand from debtor'; the daily amounts of 'cash sales' during the carrying on of the business; and one book debt. The account shewed per contra that Vaughan had expended sums amounting in the whole to 324*l.* 19*s.* 3*d.*" and so on; in other words, he had received in the course of business a sum of 293*l.*, but he had expended more than that sum. This was an application by the official receiver that Vaughan should forthwith pay to him the sum of 293*l.* which he had received, independently of what he had paid away. The best indication of the view of the Court is found in the argument which took place with counsel. Cave J. said (1) in answer to this claim: "Surely you can only claim the property of the bankrupt which the appellant actually received." Stephen J. said: "You may treat him as your agent, and then, no doubt, you would have a remedy against him for any misconduct in that character, or you can treat him as a trespasser and recover damages from him. But you cannot have it both ways." Cave J. further said: "You are claiming more than is allowed as against a trespasser who converts minerals in a mine; he is entitled to some allowances. You want to make none at all." Again, Stephen J. said (2): "If, on the other hand, you treat him as a trespasser, and claim reparation for the wrong which he has done you, I think you can only have compensation for that of which he took wrongful possession," and the answer of counsel was: "We elect to treat him as a trespasser." The result was that the order, so far as it directed the payment of the 293*l.* which had been received by the receiver was discharged; in other words, that case definitely decides that, where there is a man placed in the position of a receiver and carrying on business, you cannot treat him as a trespasser and at the same time have the benefit of the man's conduct after the date at which you treat

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(1) 14 Q. B. D. 29.

(2) Ibid. 30.

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him as a trespasser and treat him as the repository on your behalf of certain moneys which have come to his hands. That case of *Ex parte Vaughan* (1) seems to me very material to the present case and offers important guidance.

There is no question that the title of the trustee relates back to the date of the transfer to the company. That was decided in *In re Carl Hirth.* (2) Although the title relates back and, therefore, the trustee can do as he pleases, either treat the receiver when he came on the scene as his agent or treat him as a trespasser, upon the facts which I have already indicated he definitely elected to treat him as a trespasser.

What is the measure of damages in the case of a trespasser to goods ? It is measured by their value and their higher value as taken in situ. If authority is wanted for that, *Davis* v. *Oswell* (3) provides it. It is true that special damage may in certain cases be allowed, but it must be, as in all other cases of damages, the direct result of the tort. In *Bodley* v. *Reynolds* (4), which was cited to us, there was a sum for special damage granted, and that case was explained in *France* v. *Gaudet* (5), to be intelligible on the basis that there was some notice of an existing contract. No doubt you can only recover, whether in contract or in tort, for what has been often called such damages as flow directly and in the usual course of things from the wrongful act. I am quoting the words of Bowen L.J. in *The Argentino* (6), or, as those words have been developed and expanded in the judgment of Lord Sumner in *Weld-Blundell* v. *Stephens* (7), adopted in this Court in a judgment of Bankes L.J. in *In re Polemis and Furness, Withy & Co.* (8) Quoting what Lord Sumner said, Bankes L.J. says (9): " Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate " and he

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(1) 14 Q. B. D. 25.
(2) [1899] 1 Q. B. 612.
(3) 7 C. & P. 804.
(4) 8 Q. B. 779.
(5) L. R. 6 Q. B. 199, 205.
(6) (1888) 13 P. D. 191, 201.
(7) [1920] A. C. 956.
(8) [1921] 3 K. B. 560.
(9) Ibid. 570.

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adds: "I still venture to think that direct cause is the best expression." It will be remembered, that, speaking generally, as Bowen L.J. says in *The Argentino* case (1) as to all wrongful acts whatever arising out of tort or breach of contract the English law only adopts the principle restitutio in integrum.

We have, therefore, to consider what was the damage which flowed out of the trespass; in other words, the conversion of the goods. Where you find something which is necessarily incidental to the conversion, there you may add that to the value of the goods converted.

Is it possible here for the trustee, complaining of the receiver as a trespasser, a trespasser at the date of January 9, 1929, to say that he is entitled to the proceeds of something done by the receiver after his wrongful act had been committed? What the trustee seeks to recover here is not the direct result of the tort. The receipts of the receiver were not the result of it. They were the product of the energy and work of the receiver himself and they were not necessarily incidental to the conversion.

It must always be remembered in cases where damages are claimed that the plaintiff who claims them ought to take steps to mitigate his loss. In the present case if the trustee had been minded to carry on the business, it would have been possible for him to have replaced these goods which he claims were taken improperly from him, such things as the plant and machinery, the motors and vans, the office furniture and so forth. He could have put the same energy into the work which ultimately resulted in the profit gained by the receiver in carrying on the business.

Here let me point to a somewhat analogous case. There have been cases where a man is found to be the executor de son tort. The executor de son tort may recoup himself in damages for all money that he has bona fide paid on account of the testator. That statement is to be found in *Fyson* v. *Chambers*. (2)

(1) 13 P. D. 191, 200.

(2) (1842) 9 M. & W. 460, 468.

We must also bear in mind that when you are dealing with a trespass and a conversion of property, when the damages are paid over that is an end of the trespass. In *Buckland* v. *Johnson* (1) Maule J. said: "When the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury. The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone; his claim was satisfied as against all the world"; in other words, upon the satisfaction of the tort in respect of which the trustee makes his claim, there is an end of the wrong done by the receiver and thereafter the plant and machinery, the office furniture and the rest of it passes to him and it is by him that the fruit of his energy has been gained and received. Such an election, of course, may not bar a remedy against some other person and, as Romer L.J. pointed out in the course of the argument, there would have been a claim possible by the trustee against those persons who paid over money to the receiver and there would have been no answer to such a claim. If an illustration of that nature is required, it is to be found in *Smith* v. *Baker*. (2)

Here there was no express notice, there was no express indication of any claim that was going to be made beyond the damages for conversion and it is to my mind entirely too late for the trustee to seek to recover the fruits of the energy of the receiver after he has made a final and complete election to treat him as a wrongdoer.

That reasoning, to my mind, supports the decision which was given in *Ex parte Vaughan* (3), which I think is the right statement of the law. Under these circumstances, I come to the conclusion that it is not possible to impute the 5600*l*. 4*s*. 10*d*. to the receiver as damages for conversion.

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(1) 15 C. B. 145, 166.
(2) L. R. 8 C. P. 350.
(3) 14 Q. B. D. 25.

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There remains the question whether or not the trustee could recover that by way of money had and received to his use. Our attention was called to the old case of *Moses* v. *Macferlan* (1), in which Lord Mansfield treats the action of money had and received upon the indebitatus counts as having been derived from equity and as being appropriate in any case in which it would be right for the plaintiff to put his hand into the pocket of the defendant and take out from it something which had been received by the defendant using the authority or using the power of the plaintiff to get it into that pocket. That doctrine of *Moses* v. *Macferlan* (2) must now be treated as gone ever since *Sinclair* v. *Brougham* (3) was decided. By that case it was determined that the action for money had and received does imply at least the fiction of a promise.

Lord Sumner said (4): "There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

In this case the action of the trustee, finally determining that the receiver was a trespasser, cut away from him the possibility of treating the receiver as an agent and, it seems to me, cut away the possibility of imputing the fiction of a promise to the receiver.

The receiver was left in possession of the business. The business was one which he carried on. He carried on all the contracts, which were dealt with and supplied out of the totality of the assets of the business, whether in money or in kind. There was no indication of goods being bought separately for one particular contract, as apart from the others, and the trustee, having elected to treat the receiver as a trespasser, has made a final determination of the matter and there cannot now be an alteration of his position to his own advantage, whereunder he seeks to recover certain sums without allowing sums which ought to be allowed in favour of the receiver; and in my judgment the doctrine of

(1) (1760) 2 Burr. 1005.
(2) Ibid.
(3) [1914] A. C. 398.
(4) Ibid. 456.

moneys had and received cannot be applied to the facts of this case.

Whether, therefore, we consider the one limb or the other limb of the argument which has been presented to us on behalf of the respondent to the appeal, it seems to me that they both fail; and for these reasons I have come to the conclusion that the order of Clauson J. must be discharged so far as it imposed a liability of 5600*l.* 4*s.* 10*d.* upon the receiver.

Lawrence L.J. On December 23, 1931, the trustee definitely elected to treat the receiver as a trespasser, and called upon him for an account on that footing. The receiver acquiesced in the position so taken up by the trustee, and it, therefore, becomes unnecessary to consider whether the trustee, in view of his previous attitude, was justified in treating the receiver as a tortfeasor.

In these circumstances the receiver does not dispute that he is liable in damages for conversion amounting to a sum of 2617*l.* 3*s.* 3*d.* being the actual value of certain plant, machinery, motors, vans, office furniture, deposits, book debts, and retentions wrongfully taken possession of by him, but he denies that he is under any further liability.

Clauson J. has held that beyond this admitted liability the receiver is accountable for an additional sum of 5600*l.* 4*s.* 10*d.* by way of special damages on the ground that the trustee was prevented from earning that sum owing to the conversion by the receiver of the plant, machinery, etc.

It is against this decision that the receiver appeals, his contention being that no special damages were pleaded and that in any event they are too remote.

The trustee seeks to uphold the judgment of the learned judge on the ground first, that the special damages were rightly awarded; secondly, in the alternative, that the sum awarded can be recovered by the trustee as money had and received to his use, and thirdly, in the alternative, that the sum awarded can be recovered as damages for wrongful intermeddling with the contracts in respect of which it was received. The determination of the issues thus raised is not free from difficulty.

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Dealing first with the question whether the learned judge was right in the circumstances of the present case in awarding any special damages for conversion, I am of opinion that, if such a claim was intended to be made at the hearing, it ought to have been pleaded and particulars of it given to the receiver. In the absence of any such plea and particulars and, indeed, of any evidence to support the claim, I do not think that the learned judge was justified in holding that the trustee was prevented by the conversion of the plant and machinery, etc., from earning the profit which the receiver in fact earned by completing twenty out of the twenty-three contracts current at the commencement of the bankruptcy.

As a matter of fact the trustee was not appointed until some months after the receiver had taken possession of the plant, etc., which moreover had been abandoned by the bankrupt over a month before that date, the Company having been in possession in the meantime. In my judgment, even if the trustee is entitled to claim special damages, the damages which he claims are too remote. There is no evidence to show to what, if any, extent the plant, machinery, etc., were essential to or were in fact used in the carrying out of the twenty contracts in question, or to what, if any, extent they contributed towards the earning of the profits made on those contracts. It is obvious that these profits could not have been earned solely by employing the machinery and plant, etc., in question, and that further materials would have to be bought. Further, the machinery and plant, etc., or some part of it, may well have been required and used for completing the three unprofitable contracts. Moreover, it is not shown that the machinery and plant, etc., were in any way special and could not have been replaced immediately had the trustee been minded to carry out the contracts himself.

The cases of *Bodley* v. *Reynolds* (1) and *France* v. *Gaudet* (2), relied upon by the trustee on this point, are distinguishable from the present case on the facts. In the former case it was held that where special damage is laid and proved there is no

(1) 8 Q. B. 779.

(2) L. R. 6 Q. B. 199.

reason for measuring the damages merely by the value of the chattels converted. In the latter case it was held that in the case of trover it is not in general special damage that can be recovered, but a special value attached by special circumstances to the articles converted; that the conversion consists in withholding from another property to the possession of which he is immediately entitled, and that the circumstances which affix the values are then determined. Further it is pointed out in that case that in *Bodley* v. *Reynolds* (1) there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools must have been occasioned to the plaintiff. In the circumstances of the present case these authorities do not help the trustee and, in my judgment, he can only recover what he in fact claimed in his points of claim, namely, the value of the plant, machinery, etc. It is plain on the evidence that the trustee was not hindered or prevented from carrying on the business of the bankrupt by any action on the part of the receiver, nor did the trustee at any time assert any right or show the slightest desire to carry on that business. What really prevented the trustee from asserting his rights was in the first instance, the fact that he was not appointed at the time when the receiver took possession of the business, and, in the next place, because after his appointment he hesitated to interfere as he was not certain whether he could avoid the assignment which the bankrupt had made to the Company.

In these circumstances it would, in my judgment, be carrying the doctrine of relation back too far to hold that the trustee was prevented by the action of the receiver from carrying on the business.

I will deal next with the claim for damages against the receiver for wrongful intermeddling with the twenty contracts in question. This claim, in my judgment, is misconceived. The claim is founded on the principle laid down in *Lumley* v. *Gye* (2) and affirmed by the House of Lords in *Quinn* v. *Leathem* (3), that an action lies for procuring a person under

(1) 8 Q. B. 779.
(2) (1853) 2 E. & B. 216.
(3) [1901] A. C. 495.

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contract with the plaintiff to break his contract, the real cause of action in such a case being a wrongful act done intentionally to damage a particular individual and actually damaging him. (See per Lord Lindley in the latter case) (1).

The principle thus established has, in my opinion, no application whatever to the facts of the present case. The contracts with which the receiver is said to have intermeddled were contracts which the bankrupt had made but was unable to fulfil. He abandoned them, and first the Company, and then the receiver, undertook the fulfilment of his obligations under them, and thus saved the bankrupt and his estate from a heavy claim for damages. So far from the acts of the receiver having been done intentionally to damage the bankrupt, or the trustee, they were done in order to recover for the bank the money which it had advanced and which had no doubt been partly utilized in carrying out the contracts, and the effect of the receiver's acts was to relieve the bankrupt and his estate from liability under those contracts. Moreover the receiver did not procure the building owners to break their contracts, nor did the building owners in fact break their contracts. The bankrupt never became entitled to any moneys thereunder after January 9, 1929, and the building owners, as in my opinion they were entitled to do, paid the moneys to the person who had undertaken the obligations of the builder after the latter had abandoned the contracts.

There remains the more difficult question whether the trustee is entitled to receive the profit made by the receiver on the twenty contracts in question as money had and received to the use of the trustee.

The true nature of an action for money had and received was considered by the House of Lords in *Sinclair* v. *Brougham.* (2) Lord Sumner in his speech (3) points out that the action was not devised by the Court of Chancery, but was a form of assumpsit already old in Lord Mansfield's time; that it had been described as "liberal" because it was attended by a minimum of formality and the plaintiff waived all torts, trespasses and damages; and that Lord Mansfield in *Towers* v. *Barrett* (1), said it was founded on eternal justice.

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(1) [1901] A. C. 535.
(2) [1914] A. C. 398.
(3) Ibid. 454, 455.

In the present case the receiver was appointed by Lloyds Bank who had bona fide advanced a substantial sum on the security of a debenture purporting to cover the whole undertaking which the Company had taken over from the bankrupt. Although the receiver was appointed by the Bank, he became in law the agent of the Company. It is not suggested that the receiver, who is a chartered accountant, acted otherwise than with the utmost good faith. Believing that he had been appointed under a valid debenture he took possession of the whole business which had formerly been carried on by the bankrupt, and was then being carried on by the Company. The bankrupt in the ordinary course of his business as a builder, had entered into twenty-three building contracts which were still current and in the course of being carried out when the receiver took possession. In January, 1929, the bankrupt was unable to carry on his business any longer for lack of funds. Thereupon he assigned his business to the Company, who borrowed from the Bank the necessary money to carry it on, and for some weeks did in fact carry it on. When the Company became unable, owing to lack of funds, to continue the business, the Bank, under the powers contained in their debenture, appointed the receiver and found the necessary money to enable him to continue the business and, as part of that business, to carry out the pending contracts, thus saving the bankrupt's estate from a heavy claim for damages. After the trustee had been appointed he allowed the receiver, without any protest, to continue to carry on the business, and all the contracts were in fact completed by him by the end of the year 1929. Twenty of these contracts in the result turned out to be profitable, and the remaining three unprofitable. In April, 1930, the assignment to the Company was declared to be fraudulent and void as against the trustee, and in December, 1931, with full knowledge of all the facts, the trustee elected to treat the receiver as a tortfeasor, as stated at the commencement of this judgment. In my opinion this election involved a reprobation of the acts of the receiver in connection with the business as a whole.

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(1) (1786) 1 T. R. 133.

In making the claim for money had and received in respect of the profits received from the twenty contracts in question, the trustee is, in my judgment, at the same time approbating and reprobating the action of the receiver. These twenty contracts, as well as the three unprofitable contracts, would have come to an abrupt end if the receiver had not carried on the business as a whole and found the necessary time, money and labour, to complete the contracts. No money was due to the bankrupt under any of these contracts at the date of the bankruptcy, and the bankrupt was under a heavy liability under them. The plant and machinery, stock, etc., of which the receiver took possession, were utilized by him in carrying on the business and completing the contracts.

The trustee has insisted upon treating the receiver as a tortfeasor, for the conversion of the plant, machinery and stock, and has succeeded in obtaining damages from the receiver on that footing.

The trustee has also sought to recover special damages for the conversion of that plant, machinery and stock, and further has claimed damages for wrongful interference with the contracts. Having failed to recover anything on these last two heads of claim, the trustee now contends that he is entitled, without having waived all torts, trespasses and damages, to recover the profit which the receiver has made on such part of the business as has resulted in a profit, although in earning that profit he has used the plant, machinery and stock which the trustee alleges were wrongfully converted ; in other words, the trustee is seeking to adopt such acts of the receiver in carrying on the business as suit him, and to repudiate such acts as do not suit him. To hold that the trustee is entitled to adopt this attitude in the circumstances of the present case would, in my opinion, not be doing justice between the parties, and would be misapplying the principle upon which, according to Lord

Mansfield, the action for money had and received is founded.

After electing to treat the receiver as a tortfeasor, and after insisting upon his accounting on that footing up to the last moment, it is not, in my judgment, open to the trustee to turn round and, whilst insisting upon damages for conversion of the plant and machinery, etc., utilised by the receiver in completing the contracts, at the same time to claim the profits earned by the completion of those contracts as money had and received to his use. In my opinion the trustee cannot adopt such an attitude, any more than he could successfully claim to treat the receiver as a tortfeasor on one day and as his agent on the next.

In the circumstances of this case I think that the act of the receiver in carrying on the bankrupt's business ought to be treated as indivisible. The receiver, wrongfully as it turned out, entered into possession of the assets of the whole business and carried on the business for the benefit of those who he thought were entitled to it. It was open to the trustee to elect to waive this tort and make the receiver account for all his transactions in connection with the carrying on of the business, or to treat him as a tortfeasor and sue him for damages on that footing; but, in my opinion, it would be most unjust to allow the trustee, after having elected to treat the receiver as a tortfeasor, having failed to recover all the damages claimed by him on that footing, whilst retaining such damages as he has in fact recovered, also to seek to recover the profits made by the receiver in respect of certain parts of the business.

The matter does not rest there. Apart altogether from the question whether the effect of the election to treat the receiver as a trespasser prevented the trustee from making the claim for money had and received, that claim in the circumstances of this case is, in my judgment, not well founded. Either the moneys paid by the building owners to the receiver were moneys which never belonged to the bankrupt, because they were earned entirely by the exertions of the receiver and were therefore properly paid to him for his own use, or else the moneys were due and owing by the building owners to the trustee in bankruptcy and were therefore paid by them to the wrong person and the building owners have not discharged their liability under their contracts. In neither case can it be said that the receiver has received the moneys to the use of the trustee.

I agree, therefore, that the appeal of the receiver ought to be allowed and that the damages which he has been declared liable to pay ought to be limited to the sum of 2617*l*. 3*s*. 3*d*.

ROMER L.J. The sale by Simms of his business and assets to William Simms Limited having been declared to be fraudulent and void, the trustee in his bankruptcy had two courses open to him. He could elect to treat Mr. Gillett, the receiver, as having taken possession of the bankrupt's assets, or what remained of them on February 14, 1929, and as having carried on the bankrupt's business as agent of the trustee, or he could elect to treat the receiver as a wrongdoer throughout. Of these two courses he chose the latter, and by letter of December 23, 1931, caused the receiver to be informed of this decision. It is true that in that letter it is said that he elects to treat the receiver as a trespasser. For myself, however, I cannot regard that statement as meaning more than this, that he does not elect to treat the receiver as having been his agent. Whatever remedies, therefore, he possessed against the receiver, if the latter were not to be treated as his agent, still remained open to him, and it becomes necessary to consider what those remedies were.

Now the receiver's acts, so far as material to the present purpose, were as follows. He had taken possession of and converted to his use certain chattels belonging to the bankrupt consisting of plant and machinery, motor vans, and office furniture, and he had carried on the bankrupt's business of a builder, in the course of which he completed and received payment under certain building contracts that had been entered into by the bankrupt.

The receiver has always been willing to account to the trustee for the value or proceeds of sale of the chattels, but contends that the trustee is not entitled to recover anything further in respect of the particular acts that I have specified. The trustee, on the other hand, contends that he is entitled to recover from the receiver as damages for the conversion of the chattels a sum equal to the profits that would have accrued to him from the building contracts but for the receiver's actions, and that the measure of such damages is the sum of 5600*l.* 4*s.* 10*d.*, that sum representing the excess of what the receiver was paid under the twenty contracts completed by him which resulted in a profit over the cost to him occasioned by the completion.

This contention on the part of the trustee has been upheld by Clauson J., and from that decision the receiver is appealing to this Court. With all respect to the learned judge I find myself unable to agree with this conclusion. It may be conceded that in an action for the conversion of chattels a plaintiff may in certain cases recover by way of special damage any loss of profit from the use of the chattels that he may have suffered by the conversion; but such special damage must be pleaded. In the present case it is not alleged in the amended points of claim that the trustee suffered any such special damage. This, in my opinion, by itself, disentitles the trustee from making such a claim; but even if he had alleged in his pleadings that he had been prevented by the receiver from making a profit by the use of the chattels, I should still be unable to agree that he was entitled to the damages awarded him by the learned judge. It is true that in contemplation of law the title of the trustee in bankruptcy relates back to January 9, 1929. He was not appointed in fact until May 27 of that year. If, therefore, the receiver, when he took possession on February 14, had taken no steps to complete the contracts, the building owners would have been entitled to treat them as having been repudiated and would ultimately have proved in the bankruptcy for the damages they had thereby sustained, for there was no one else who would or could in fact have completed the

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contracts in the absence of the receiver. Even if the trustee is to be presumed by a fiction of law to have been willing and able to do so, there is nothing to suggest that he would have made the same profit as was made by the receiver, for during the interval between January 9 and February 14, the contracts had been performed by William Simms Limited, and any materials bought by them that happened to be on the site on February 14 would be utilised by the receiver without having to pay for them. The trustee, on the other hand, would have no such right to use them. The receiver moreover, made his profit out of the contracts, and not merely by his use of the chattels. The damages awarded to the trustee by the learned judge have, therefore, in truth, been awarded him, not because of the conversion by the receiver of the chattels, but because the receiver completed the contracts.

The matter may be tested in this way. Supposing that the trustee had himself been completing the contracts and had been deprived by the receiver of the chattels in question, in an action for damages for conversion of the chattels the trustee could not have recovered in addition to the value of the chattels anything more than the amount of profits lost to him by being deprived of the use of such chattels during the time necessary to replace them. If the receiver had wrongfully removed a ladder essential for the building operations, the trustee could not cease building and recover as damages for conversion the whole profits that would have accrued to him had he bought another one and completed the contract.

It is perhaps for this reason that before us counsel for the trustee claimed in the alternative to be paid the sum of 5600*l.* 4*s.* 10*d.* as damages occasioned to him by reason of the interference or (as it is called in the points of claim) the intermeddling by the receiver with the contracts. To such claim there are obvious objections. In the first place, as indicated above, the action of the receiver in completing the contract was to the trustee's advantage, and not to his detriment. The estate of the bankrupt was relieved from a heavy claim for damages on the part of the building owners.

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In the second place the receiver committed no wrong to the trustee when he completed the contracts except, of course, by the conversion of the chattels for that purpose. Had he induced the building owners to commit breaches of their contracts with the bankrupt, the matter would have been different, but they committed no such breach. All that happened was that after the bankrupt had broken the contracts, as he did on January 9, 1929, when he ceased to perform them, the building owners as from February 14 permitted the receiver to proceed with and ultimately to complete them. At the time of the receiver's appointment the bankrupt, by reason of his default in carrying out the contracts, had no enforceable rights against the building owners, and the doctrine of relation back would not put the trustee in any better position in this respect. The trustee in truth seeks to approbate and reprobate. He is endeavouring at one and the same time to treat the receiver as a wrongdoer in completing the contracts, and yet in doing so as having kept them alive for his benefit.

In my opinion the claim of the trustee to the 5600*l.* 4*s.* 10*d.* damages cannot be sustained either as damages for conversion of the chattels or as damages for intermeddling with the contracts.

The trustee, however, by way of further alternative, claims to be paid this sum as money had and received by Mr. Gillett to his use. Now the nature of the action for money had and received was clearly explained by the House of Lords in *Sinclair* v. *Brougham.* (1) " There is now," said Lord Sumner, after an examination of the authorities, " no ground left for suggesting as a recognisable ' equity ' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer." The action, said Lord Haldane, was in principle one which rested on a promise to pay either actual or imputed by law ; and he subsequently added that the remedy must be taken to have been given only when the law could consistently impute to the defendant at least the fiction of a promise. It is by no means clear in what circumstances the law will impute this fiction. Lord Sumner said that the action cannot now be extended beyond the principles illustrated in the decided cases, and that it was hard to reduce to one common formula the conditions under which the law would imply a promise to repay money received to the plaintiff's use.

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(1) [1914] A. C. 398, 456.

I have no intention of attempting to do what Lord Sumner found difficult. But it seems reasonably clear that such a promise will not be implied unless it is inequitable or contrary to eternal justice that the payee should retain the money as against the plaintiff in the action. Furthermore, it is obvious that the promise to be implied must be a promise made to the plaintiff or his agent; he could not otherwise sue upon it. Where, therefore, A, who owes a certain sum to B, pays the sum to C under the mistaken impression that he is thereby discharging himself of his indebtedness to B, a promise by C to repay A would be readily and properly implied; as might conceivably a promise given by C to A to pay the money to B, though my attention has not been called to any case in which a promise to pay the money to a third person who was in no way a party to the transaction of payment has ever been implied; but I fail to see how the law can imply a promise given by C to B to pay him the money, for, in the first place, B has been in no way affected by A's payment to C; the debt owing by A to B still remains undischarged and B can sue for its recovery. In the second place B was no party to the transaction of the payment, and a contract between C and B cannot be implied as arising out of the transaction between A and C. Besides, as I have already pointed out, the law would imply a contract by C to repay the money to A, and could not reasonably imply another and co-existing one to repay the same money to B. In such a transaction as I have supposed C would probably hand over the money to B and have done with it; for B could recover judgment against A, and A against C.

It was no doubt considerations of this kind that induced the receiver to admit his liability to account to the trustee for the book debts collected by him. But for the reasons I have given, I do not think that an action against him at the suit of the trustee for money had and received would have been maintainable. *Andrews* v. *Hawley* (1), when carefully examined, is no authority to the contrary. In *In re Goldburg No.* 2 (2) Phillimore J. no doubt held a receiver, in similar circumstances to the present, accountable to the trustee in bankruptcy for book debts that he had collected ; but there was no reference in the arguments, or the judgment, to the action for money had and received. What the learned judge said was that the receiver was accountable for those assets of the bankrupt such as book debts, and that he had either to deliver them up or pay damages for their conversion. With all respect to the learned judge the book debts were not traced to the receiver's hands, nor had he, nor could he, have converted them. They still remained owing by the debtors to the trustee in bankruptcy. In the circumstances I cannot regard this case as an authority for the proposition for which it was cited.

If an action at the suit of the trustee for money had and received to his use would not lie against Mr. Gillett in respect of the moneys collected by him from the debtors to the bankrupt, a fortiori no such action would lie in respect of the moneys paid to him in respect of the building contracts that were completed by the receiver under which no moneys were payable by the building owners to the bankrupt or his trustee at the date of the receiver's appointment or afterwards. It is indeed difficult to see why a promise should be implied by the receiver to hand over to the trustee a profit made by him through the exercise of his own skill and the expenditure of his own money merely because to some unknown extent he took advantage of work already done by the bankrupt, work in respect of which neither the bankrupt nor the trustee could have recovered any payment from the building owners.

For these reasons I am of opinion that the claim of the trustee to be paid the sum of 5600*l.* 4*s.* 10*d.* should be rejected,

(1) 26 L. J. (Ex.) 323.

(2) [1912] 1 K. B. 606.

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and the order of Clauson J. varied as asked by the notice of appeal, but substituting for the sum of 1617*l.* 3*s.* 3*d.* mentioned in that notice the sum of 1675*l.* 3*s.* 3*d.*

Appeal allowed and order varied.

Solicitors for appellants: *Stafford Clark & Co.*
Solicitors for respondent: *Adler & Perowne.*

W. I. C.

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May 18.
C. A.
Oct. 6.

In re RUSS AND BROWN'S CONTRACT.

[1933. R. 533.]

Vendor and Purchaser—Misdescription—Underlease described as Lease—Conditions of Sale.

A contract for sale of property held by underlease will not be enforced against a purchaser unless it distinctly specifies that that which is offered for sale is an underlease: it is not enough for the vendor to show that, after a careful study of the whole contract, it might be held that, upon its true construction, what the vendor is offering for sale is an underlease.

The property in lot 1, described in the particulars of sale as eight leasehold dwelling-houses was sold subject to special conditions of sale and the National Conditions of Sale. Some of the houses were stated in the particulars to be held for a term of 90 years and others for a term of 99 years (less 7 days). One of the special conditions was: "The title to lot 1, shall commence with the leases under which the respective properties are held," and the sixth of the National Conditions was: (1.) "Leaseholds:—The abstract of title to leasehold property shall (unless otherwise provided) commence with the lease or underlease creating the term sold." (2.) "Inspection of lease:—The lease or underlease or a copy thereof may be examined at the office of the vendors' solicitors . . . . and the purchaser shall be deemed to have bought with full notice of the contents thereof." (3.) "Property held by underlease:—When property sold is held by underlease no objection or requisition shall be made on that account . . . . "

The purchaser having objected to the title on the ground that the houses which the vendors contracted to sell as leaseholds were in fact held by underlease, a summons was taken out by the vendors for a declaration that the purchaser's objection had been sufficiently answered and that a good title had been shown in accordance with the contract.

Held, by Clauson J. and the Court of Appeal, that the objection had not been sufficiently answered and that no such title to the houses had been shown as the purchaser was bound to accept.

VENDOR AND PURCHASER SUMMONS.

By a memorandum in writing dated Nov. 23, 1932, the purchaser acknowledged that he had that day purchased the property described in the particulars annexed thereto as lot 1 for 800*l.* and had paid to the auctioneer 80*l.* as a deposit and in part payment of the purchase money and agreed to complete the purchase according to the conditions of sale annexed thereto, and as agents for the vendors the auctioneer ratified the sale and acknowledged the receipt of the deposit.

In the particulars of sale lot 1 was described as "The eight leasehold dwelling-houses known as Nos. 11, 12, 13, 14, 15, 17, 19 and 20 All Saints' Street, King's Cross, N.1." And it was therein stated that Nos. 11, 13, 15, 17 and 19 were held for a term of 90 years from June 24, 1849, at a total ground rent of 42*l.*; and that Nos. 12, 14 and 20 were held for a term of 99 years (less 7 days) from March 26, 1846, at the total ground rent of 24*l.* in respect of Nos. 12 and 14, and 6*l.* in respect of No. 20.

The material special conditions of sale were the following:—

"1. The properties are sold subject to the conditions following and to the conditions known as 'The National Conditions of Sale, 11th ed.' (a copy of which can be seen at the offices of the auctioneers or at the vendors' solicitors during office hours) so far as the National Conditions are not varied by or inconsistent with the conditions following.

"7. The originals of the leases under which the various properties are held can be seen at the vendors' solicitors at any time during office hours, and the purchaser shall be deemed to purchase with full knowledge of the contents both with regard to the term, the rent, and otherwise, and no objection shall be raised to them of any nature whatsoever.

"9. The title to lot 1 shall commence with the leases under which the respective properties are held."

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No. 6 of the National Conditions of Sale was as follows :—

" *Leaseholds.* (1.) The abstract of title to leasehold property shall (unless otherwise provided) commence with the lease or underlease creating the term sold.

" *Inspection of Lease.* (2.) The lease or underlease or a copy thereof may be examined at the office of the vendors' solicitors, during office hours on the five working days preceding the day of sale, and the purchaser (whether or not he inspects the same) shall be deemed to have bought with full notice of the contents thereof.

" *Receipt for Rent.* The production of a receipt for the last payment of rent accrued due under the lease under which the property sold is held, before completion, shall be accepted as conclusive evidence that all the covenants and conditions contained in the said lease and in every superior lease (if any) have been duly performed and observed. . . .

" *Property held by Underlease.* (3.) Where the property sold is held by underlease no objection or requisition shall be made on that account or on account of the covenants by the tenant in the underlease not corresponding with the covenants by the lessee in the superior lease or of any superior lease comprising other property than that sold."

Several points were taken on the title, but counsel agreed that the only outstanding requisition was that which was dealt with in correspondence between the purchaser and the vendors. In a letter dated January 2, 1933, the purchaser's solicitors objected that from a perusal of the abstract it appeared that the houses were held by underleases and not leases as mentioned in the seventh of the special conditions. The answer to that on January 3, from the vendors' solicitors was as follows :—" So far as the vendors are aware, only Nos. 12, 14 and 20 are held by underlease and this is quite apparent from the particulars of sale which mention the term as being 99 years less seven days. The word ' lease ' in the special conditions of sale is a generic term including underleases and we submit is quite regularly used in that sense. You refer to special condition 7 which together with condition 6 (3.)

of the National Conditions of Sale seems to us to put your objection entirely out of court. Your client could before the sale have inspected the leases for himself." That letter was written under a misapprehension to the extent that not only were Nos. 12, 14 and 20 which were stated to be held for a term of 99 years less 7 days, held by underlease, but Nos. 11, 13, 15, 17 and 19 stated in the particulars to be held for a term of 90 years were also in fact held by underlease. The reply to that answer was contained in a paragraph in a letter of January 4, 1933, from the purchaser's solicitors as follows: "From the abstract it appears that Nos. 11 to 19 All Saints' Street are held on an underlease as the superior landlords are referred to therein. We cannot agree that the word lease in the special conditions of sale is a generic term or that the same is quite regularly used in that sense. In our view National Condition No. 6 (3.) is not applicable, and it is not for a purchaser to inspect documents prior to contract to ascertain that statements made by the vendor are correct. He is entitled to rely upon the vendor's representation."

The vendors accordingly applied by summons for a declaration that the purchaser's objections had been sufficiently answered by the applicants and that a good title to the property had been shown in accordance with the contract.

G. P. Slade for the vendors. Reading the particulars in the light of No. 6 of the National Conditions of Sale which form part of the contract into which the purchaser was invited to enter, it was not a misdescription of the dwelling-houses offered for sale to describe them as leasehold dwelling-houses, notwithstanding that in fact they were held by underlease: per Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway.* (1) The description of them as leasehold, reading the particulars in conjunction with the conditions of sale, might mean that the dwelling-houses were either held by lease or by underlease. There is some ambiguity in the description, especially having regard to the statement in the particulars that some of the dwelling-houses are held for a term of 99

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(1) (1879) 13 Ch. D. 754, 759.

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years less seven days. No. 6, cl. 3, of the National Conditions is explicit and makes it a term of the contract between the parties that where the property is held by underlease, as in fact the property described in the particulars is, no objection is to be taken on that account. The statement in the particulars as to the tenure of the dwelling-houses was not untrue; it was ambiguous and having regard to No. 7 of the special conditions of sale, it was the duty of the purchaser to inspect. Had he in fact inspected he would have seen that the "leases" were in fact underleases. Not having availed himself of the opportunity of inspection, he must be deemed to have purchased with full knowledge that the houses were held by underlease: see passage in the judgment of Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway* (1) "But where the statement itself is not untrue . . . . was an underlease."

In re Beyfus and Masters's Contract (2) is distinguishable, because there there was a clear misdescription: the term was stated to be 90 years, whereas it was 90 years less two days. The disapproval by Bowen and Fry L.JJ. expressed in that case of the dictum of Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway* (3) was only by way of dicta. In *Charles Hunt, Ld.* v. *Palmer* (4) there was a misdescription of the subject matter of the contract. It is not disputed that where property is offered for sale as "leasehold" without more being said, the vendor must show that the property is held direct from the freeholder: per Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway* (3); Fry on Specific Performance, 6th ed., p. 580, para. 1250.

[Clauson J. referred to a statement in Williams on Vendor and Purchaser, 3rd ed., at p. 339, that "a purchaser is entitled to require the assignment to him of a lease from the freeholder, unless the contract distinctly specified an underlease as the subject of the sale."]

That statement of the law goes too far; the true rule is that stated by Jessel M.R. in the case last cited that where nothing more is said, lease means lease from the freeholder. Here there is an extension in the contract of the term "leasehold" beyond the strict literal meaning of the word.

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(1) 13 Ch. D. 762.

(2) (1888) 39 Ch. D. 110, 115.

(3) 13 Ch. D. 754, 759.

(4) [1931] 2 Ch. 287.

C. R. D. Richmount for the purchaser. A contract to sell a lease will not be enforced against a purchaser, if it is in fact an underlease. Condition No. 6, cl. 3, of the National Conditions can only apply where the subject matter of the sale is an underlease. That condition cannot be read with the particulars so as to put a different meaning upon the word "leasehold" in the particulars from that which the word ordinarily bears. Here the purchaser was buying a lease and Condition No. 6, cl. 3, does not apply. The statement in the particulars that some of the houses are held for a term of 99 years less seven days is not enough to fix the purchaser with notice that he was buying an underlease, having regard to the description of those houses as leasehold. As in *Broom* v. *Phillips* (1) the purchaser did not know that it was in fact an underlease which he was intending to purchase and there was nothing in the particulars or conditions to fix him with notice that the property offered for sale was held by underlease.

G. P. Slade in reply. The judgment of Kekewich J. in *Broom* v. *Phillips* (1) exactly states the point: the ordinary rule does not apply where the purchaser has contracted to take an underlease. This is the true meaning of the contract here.

Clauson J. This is a summons taken out by the vendors in respect of a contract of sale, for a declaration that the requisitions and objections to the title in respect of the property comprised in the contract have been sufficiently answered by the vendors and that a good title has been shown in accordance with the contract of sale.

The contract consists of a memorandum at the end of printed particulars, whereby the purchaser acknowledges that he has purchased lot 1 described in the particulars, and he

(1) (1896) 74 L. T. 459.

undertakes to complete the purchase in every respect according to the auction conditions of sale. Lot 1 is described as, "The eight leasehold dwelling-houses known as," and then there are certain even and certain odd numbers. That description is followed by this: "Nos. 11, 13, 15, 17, and 19 are held for a term of 90 years from the 24th June, 1849, at a total ground rent of 42*l.* per annum"; and then, "Nos. 12, 14, and 20 are held for a term of 99 years (less seven days) from 26th March, 1846, at a total ground rent of 24*l.* per annum on Nos. 12 and 14, and 6*l.* per annum on No. 20." The special conditions incorporate the National Conditions of Sale, and the 9th special condition says, omitting irrelevant words: "The title to lot 1 shall commence with the leases under which the respective properties are held." The National Conditions incorporated in the contract contain amongst others this condition, "No. 6." [His Lordship read clauses 1 and 2 of that condition and continued:] And then sub-clause 3: "Where the property sold is held by underlease no objection or requisition shall be made on that account or on account of the covenants by the tenant in the underlease not corresponding with the covenants by the lessee in the superior lease or of any superior lease comprising other property than that sold." Several points were taken on the title, but counsel agreed before me that the only outstanding requisition, and the only one with which I have to deal, is that which is contained in passages from three letters of January 2, 3 and 4, 1933, which I will proceed to read. [His Lordship then read the passages from those letters as set out above, and proceeded:] The first point that I have to consider in my view is what is it that the vendors offered for sale in the particulars of lot 1? In offering that which they described as lot 1, were they offering houses held by lease from the freeholder, or were they offering something else? Sir George Jessel M.R., in 1879, in *Camberwell and South London Building Society* v. *Holloway*, said (1): "The word 'lease' in law is a

(1) 13 Ch. D. 754, 759.

well-known legal term of well defined import. No lawyer has ever suggested that the title of the lessor makes any difference in the description of the instrument, whether the lease is granted by a freeholder or a copyholder with the licence of the lord or by a man who himself is a leaseholder. It being well granted for a term of years it is called a lease. It is quite true that where the grantor of the lease holds for a term the second instrument is called either an underlease or a derivative lease, but it is still a lease, and consequently when a man sells a thing by its known and proper legal description, it does not appear to me that he can be charged with misrepresentation. If he says, 'I sell you a house held under a lease for a term of twenty-one years,' every word of that is true, although the lessor may hold under a lease himself." If that statement of Sir George Jessel could be held by me, sitting as a judge of first instance, to represent the law, the vendors would be entitled to succeed on this summons, because I should be entitled, and, indeed, bound to read the description of lot 1 as amounting to an offer for sale of houses held for a term of years which might or might not be carved directly out of the estate of the freeholder. The matter does not stop there, and I must read the next words of Sir George Jessel. He said: (1) "As I understand the decisions, it has been decided that where a man sells a lease for a defined term of years, and nothing more is said on either side, he does not make a good title to the lease unless he shews that he holds direct from the freeholder, or, I suppose, the copyholder under license from the lord. I am not in a position to overrule those decisions. There are too many of them. Whatever the reasons may be, as I understand the matter, standing alone, and without anything being said beyond, you do not make a good title unless you shew what has been called an original lease, but when we come to something else beyond being said, there is no such decision." Now, pausing there, as I understand it, what Sir George Jessel in effect is saying is this: "Contrary to my opinion

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(1) 13 Ch. D. 760.

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of what the law ought to be, the law in fact is that when a man, without saying anything more, offers for sale a leasehold dwelling-house, he must be understood to be offering for sale a dwelling-house held for a term of years carved immediately out of the estate of the freeholder." That that is the correct view of the law, so far as a Court of first instance is concerned, seems to me now to be settled by not perhaps actual decisions, but by certain statements made quite deliberately by two judges of eminence sitting in the Court of Appeal. In the case of *In re Beyfus and Masters's Contract* (1), Bowen L.J. says this : "Great stress was laid on a dictum of the late Master of the Rolls in *Camberwell and South London Building Society* v. *Holloway* (2), dissenting from *Madeley* v. *Booth* (3). It must, however, be observed that the remark of the Master of the Rolls was not material to his decision, for in that case the purchaser had notice at the auction of the true nature of the interest which he was going to buy. This remark, therefore, though made by a great judge, cannot in my opinion displace the decision in *Madeley* v. *Booth.* (3) In *Hayford* v. *Criddle* (4), Lord Romilly says, 'a contract to assign a lease is not satisfied by granting or assigning an underlease,' and he gives as the reason that an underlessee is exposed to the risk of forfeiture through acts done by his immediate lessor." Bowen L.J. appears there to approve and affirm Lord Romilly's view. And Fry L.J. in the same case says this : "It was urged that an underlease is the same thing as a lease, or better. In some respects it may be better, but it is not the same, and in some respects it is worse."

Having regard to those decisions, in my view, the purchaser at this auction in purchasing lot 1 was entitled to treat the description of lot 1 as offering to him houses held for terms of years from a freeholder.

A further question which I have to decide is whether that prima facie meaning of what is contained in that statement is to some extent, and if so to what extent, qualified by the fact that the contract contains not only the description of the property, but also a special condition of the National Conditions. One of the National Conditions is this: "Where the property sold is held by underlease, no objection or requisition shall be made on that account." As I understand the argument put to me by counsel for the vendors, it was this: You must read the particulars and that condition together, and the net result is that in this contract to sell a dwelling-house held by lease, the expression "lease" means either underlease or lease, and that is the fair construction of the contract. In my view, the rights of the parties in this case depend upon the answer to the question, if the vendor offers an assignment of a sub-lease, will the purchaser get that which he may fairly be taken to have agreed to buy? It appears to me that the law on the matter is best expressed in a sentence that I borrow from the late Mr. Cyprian Williams' book on Vendor and Purchaser, 3rd ed., p. 339: "The purchaser is entitled to require an assignment to him of a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale." Accordingly, I have to consider the question: Did this contract distinctly specify an underlease as the subject of the sale? In my view, it did not. It will be observed that my view is consistent with the proposition that on a careful study of everything in the contract it may be that, on the true construction, the contract might be held to amount to a contract by the purchaser to be content with an underlease; but in my view, unless the contract distinctly specifies that that which is offered for sale is an underlease, it will not be enforced against the purchaser. I have been referred to a decision of my own, the case of *Charles Hunt, Ld.* v. *Palmer* (1), where the vendor failed to enforce the performance of the contract of sale, because the Court came to the conclusion, on a fair reading of the particulars, with, of course, the rest of the contract, that if the contract were to be

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(1) 39 Ch. D. 110, 115.
(2) 13 Ch. D. 754, 759.
(3) (1848) 2 De G. & Sm. 718.
(4) (1855) 22 Beav. 477, 480.

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(1) [1931] 2 Ch. 287.

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enforced, the Court would be forcing the purchaser to take something different from that which he was led by the vendor to expect. In my view, if I were to enforce this contract against the purchaser, I should be forcing him to take something different from that which he was led to believe he got under the contract, because, in my view, it was not distinctly specified in the particulars that it was an underlease that was being sold, and he was entitled to treat the particulars as offering a lease.

In those circumstances, I propose to declare that the requisitions and objections to the title to the property comprised in the contract have not been sufficiently answered by the vendors, and that no such title to the said property has been shown as the purchaser is bound to accept.

H. C. H.

C. A.

The vendors appealed. The appeal was heard on Oct. 6, 1933.

G. P. Slade for the appellants repeated the arguments used by him in the Court below.

C. R. D. Richmount for the respondent was not called upon to argue.

Lord Hanworth M.R. Mr. Slade has presented a very interesting argument and has said all that there is to be said on this subject; but the facts, or rather the terms of the conditions of sale are, I think, too plain to enable him to get away from the actual words. The law as stated by Sir George Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway* (1) is plain enough: that where the word "lease" is used it is not satisfied by an underlease, and in the present case we have the word "lease" used. It is quite true that a provision is made for the National Conditions of Sale to be introduced where they would be appropriate, and are not inconsistent with the conditions following; but that is a limited introduction and I see no means of coming to a conclusion such as Sir George Jessel did in the particular case before him, that there was an indication that "lease" included "underlease."

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(1) 13 Ch. D. 754.

For the reasons given by Clauson J., I think his decision is right, and this appeal must be dismissed with costs.

Lawrence L.J. I agree, and have nothing to add.

Romer L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *C. A. Russ & Son.*
Solicitors for respondent: *H. C. Hardcastle Sanders.*

W. I. C.

In re COULSON.

Ex parte OFFICIAL RECEIVER (TRUSTEE).

C. A.
1933
Oct. 6.

[No. 289 of 1922.]

Bankruptcy—Inquiry as to Bankrupt's Dealings and Property—Discharge of Bankrupt—Subsequent Application by Trustee for Inquiry—Jurisdiction of Court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.

The power given to the Court by s. 25 of the Bankruptcy Act, 1914, to order the attendance for examination of the bankrupt and persons capable of giving information respecting the bankrupt, his dealings or property is not limited to the duration of the bankruptcy, but survives the effective discharge of the bankrupt.

Appeal from a decision of Mr. Registrar Mellor.

On March 21, 1922, a receiving order was made against the bankrupt, Frederick Aslett Coulson, and on March 31, 1922, he was adjudicated bankrupt. On April 4, 1922, a summary order was made and the Official Receiver became the trustee in the bankruptcy.

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On October 18, 1922, the bankrupt obtained an order of discharge, subject to a suspension of two years. The discharge thus became effective on October 18, 1924.

Under the will of one John Green, who died on July 12, 1909, the bankrupt became entitled on the death of his mother, Alice Coulson, to a share of the testator's estate in default of any appointment made by her.

Alice Coulson died on January 9, 1928, without having exercised her power of appointment, and the Official Receiver thereupon claimed that he was entitled to the bankrupt's share under the will of John Green.

Subsequent to his discharge the bankrupt created charges on his interest in favour of the Scottish Reversionary Company, Ld., and those charges had been paid off out of the bankrupt's share, and the balance of the share was paid to the bankrupt.

At the date of the distribution the trustees of the will were Henry Green, Arthur Green and Alfred Henry Coulson. Arthur Green had since died.

On September 14, 1933, the Official Receiver applied to the Court under s. 25 of the Bankruptcy Act, 1914, for an order for the examination of the bankrupt and the surviving trustees of the will.

The Registrar refused to make any order on the application and embodied his reasons in the following memorandum dated October 3, 1933: "Although s. 25, sub-s. 1, says that 'The Court may at any time after a receiving order has been made against a debtor' make such an order as is hereby asked for, the applicants have not been able to cite any reported case in which an order has been made under this section after the discharge of the bankrupt has become effective. Here the bankrupt's discharge became effective on October 18, 1924. In my view, and in accordance with the practice, I think I ought not to entertain an application under s. 25 after the discharge has become effective. My attention has been called to s. 26, sub-s. 9, which requires a bankrupt to assist the trustee in realizing his property.

But that sub-section also provides a remedy for that breach of duty. Moreover, the present application asks for the examination of two other witnesses.

"The fact that the debtor here became bankrupt again in 1931 and is still undischarged is immaterial. There is a private trustee in the second bankruptcy and, as the Official Receiver's report shows, the property would be vested in the Official Receiver as trustee in the first bankruptcy.

"I therefore make no order on the application."

The Official Receiver as trustee appealed. The appeal was heard on October 6, 1933.

W. N. Stable for the appellant.

Lord Hanworth M.R. It is right to send this case back to the learned Registrar in order that he may exercise his discretion as to what order he will make under s. 25 of the Bankruptcy Act of 1914. We understand that he has not exercised any discretion at all, but has felt himself unable to make use of the section by reason of the fact that in respect of a bankruptcy in which the debtor was adjudicated a bankrupt on March 31, 1922, the debtor obtained his discharge, which became effective in 1924.

The facts are that on October 18, 1922, the application for discharge was heard and the discharge was suspended for two years; and the bankrupt was ordered to be discharged as from October 18, 1924. Now there has supervened a subsequent bankruptcy. On March 2, 1931, Mr. Coulson was once more adjudged bankrupt, and a trustee was appointed. It appears that in the first bankruptcy the bankrupt disclosed that he had a contingent interest under the will of John Green deceased, but against that no value was placed owing to it being on a contingency, and such an uncertain contingency that no price could be obtained for it. By reason of the intervening interest having passed in 1928 the bankrupt has become entitled to a sum of money, and what is suggested is that it might be of assistance to the Registrar that the trustees of the will under which that interest arose should come and give evidence, they being ordered to attend under s. 25. Now the powers that are given by s. 25 are not limited to any time or to the duration of the bankruptcy from which the debtor obtained his discharge, and it will be observed that by s. 26, sub-s. 9, an indication is given that the powers of s. 25 remain in being. That sub-s. 9 is as follows: "A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee, and, if he fails to do so, he shall be guilty of contempt of court." That clearly indicates the distinction which is drawn and effected between the discharge of the bankrupt and the duty which still remains in the trustee as to the realisation and distribution of such of his property as is vested in the trustee. It would therefore be an unfortunate contraction of the powers given by s. 25 for the Court to hold that they were limited or lost by the discharge of the bankrupt from his bankruptcy. In these circumstances it appears to us that the powers given by s. 25 survive the effective discharge of the bankrupt, and the case must therefore be sent back to Mr. Registrar Mellor to exercise his discretion upon the matter before him.

LAWRENCE L.J. I agree.

ROMER L.J. I agree.

Appeal allowed.

Solicitors for appellant: *Tarry, Sherlock & King.*

W. I. C.

In re HOWES.

CLAUSON J.

1933

July 24.

[No. 959 of 1931.]

Bankruptcy—Priorities between Creditors—Partner of Debtor—Claim of Debtor's Partner postponed to claims of Creditors of Partners for Interest—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 8.

Applying the following well-settled principle of bankruptcy, that, just as a debtor may not, when proving against the assets, compete with his own creditors, so a partner of a debtor may not compete with that debtor's creditors, so long as there are any creditors of the debtor not fully satisfied, to whom the partner is under liability. Where the assets of the bankrupt are sufficient to satisfy in full the statutory interest on the amounts due to the separate and joint creditors respectively, but are not sufficient to pay, in addition thereto, the amount due to a partner of the debtor, the separate and joint creditors are upon the proper construction of s. 33, sub-s. 8, of the Bankruptcy Act, 1914, entitled, in priority to the partner of the bankrupt, to be paid the statutory interest in full on their respective debts proved in the bankruptcy.

MOTION.

On October 2, 1931, a receiving order was made against the debtor; on October 20, 1931, he was, upon his own petition, adjudicated bankrupt and on October 21 a trustee of his estate was appointed.

Sometime before and at the time of his bankruptcy the bankrupt was engaged in a joint adventure with Sir Charles Cottier for the development of certain land at Cheam. Amongst the partnership liabilities was an overdraft due to the bank standing in the names of the bankrupt and one Walling who was the nominee of the bankrupt's partner, Sir Charles Cottier, by whom the payment of the overdraft was guaranteed.

Sir Charles Cottier having died on August 22, 1926, his executors, on February 29, 1932, paid to the bank the sum of 4731*l*., the amount due on the overdraft.

After payment to the separate creditors of the bankrupt of 20*s*. in the £, and after satisfying certain costs of administration and remuneration, there remained in the

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hands of the trustee a sum of 3025*l.* available for distribution. The partnership liabilities outstanding amounted to 1249*l.* 16*s.* 11*d.* and the amount due to the executors of Sir Charles Cottier upon the final adjustment of their claim was 1541*l.* 4*s.* 2*d.* Upon the basis of paying the partnership creditors 1249*l.* 16*s.* 11*d.* and Sir Charles Cottier's executors 1541*l.* 4*s.* 2*d.*, making together 2791*l.* 1*s.* 1*d.*, a balance would remain of 234*l.* which would not be enough to pay in full the statutory interest at the rate of 4*l.* per cent., amounting to 450*l.* due to the separate creditors and to 90*l.* due to the partnership creditors. Accordingly, if the debt due to Sir Charles Cottier's executors were postponed to the claims of the separate and joint creditors for interest, there would not be enough to pay in full the debt due to the executors.

Accordingly, the question of priority between the claims of the creditors for interest and the claim of the executors was raised by this motion on the part of the trustee in bankruptcy for the determination of the Court.

W. N. Stable for the trustee.

G. F. Kingham for respondents appointed to represent the separate creditors. The principle applicable here is that which was stated by Lord Eldon in *Ex parte Reeve* (1) that neither the partnership nor the individual debtor should claim in competition with the creditors and, if the creditors were entitled to interest, the interest was as much a debt as the capital; and the principle would prevent either the partnership or the individual debtor from ranking with the other creditors until all their demands were satisfied, which included both principal and interest of their debts.

He cited also *Ex parte Clarke* (2); *Ex parte Ogle* (3); *Ex parte Minchin* (4); and referred to Williams' Bankruptcy Practice, 14th ed., p. 199.

[CLAUSON J. referred to *Nanson* v. *Gordon*. (5)]

Theodore F. Turner for the executors of Sir Charles Cottier deceased. Any surplus assets of the bankrupt can only be applied in payment of interest under s. 33, sub-s. 8, of the Bankruptcy Act, 1914, "after payment of the foregoing debts." It follows from that that the right of the executors to prove given to them by the previous section of the Act, namely, s. 30, is, by s. 33, sub-s. 8 (1), given precedence over the claims of the creditors to interest.

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(1) [1804] 9 Ves. 588, 590.
(2) (1799) 4 Ves. 677.
(3) (1831) Mont. 350.
(4) (1827) 2 Gl. & J. 287.
(5) (1876) 1 App. Cas. 195.

Ian S. Macdonald for a respondent appointed to represent the joint creditors, adopted the argument of counsel for the separate creditors.

Clauson J. In this case the bankruptcy is that of a Mr. Horace Howes. He was a partner in a joint adventure with Sir Charles Cottier. Mr. Howes had separate creditors, and he and Sir Charles Cottier had joint creditors, creditors in respect of the partnership adventure. Some of those joint creditors have been paid by Sir Charles Cottier's executors, and with them I have nothing to do; but the position, when a short time ago an arrangement was made for making certain payments, was that Mr. Howes' estate was indebted to separate creditors in the sum of 6340*l.*—and it was indebted to joint creditors who had proved (and whose proof, of course, had been rejected in so far as they claimed to compete with the separate creditors) for 1249*l.* 16*s.* 11*d.* Sir Charles Cottier's estate was in this position; as soon as that sum of 1249*l.* 16*s.* 11*d.* due to the joint creditors had been paid off there would, on a balance of partnership accounts, be a claim by Sir Charles Cottier's estate against Mr. Howes' estate for a balance of, roughly, 1541*l.* If Sir Charles Cottier's estate had paid off the 1249*l.* due to the joint creditors, and so have got rid of that proof altogether, they would, of course, have been in a position to add that 1249*l.* odd to the 1541*l.* and claim to be paid out of Mr. Howes' estate the whole 2791*l.*

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(1) Sect., 33 sub-s. 1: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:

Sub-s. 8: "If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

The separate creditors have in fact been paid 20*s*. in the £. The joint creditors, amounting to 1249*l*. 16*s*. 11*d*., have been paid 20*s*. in the £. There is enough to pay Sir Charles Cottier's estate the 1541*l*. and also to pay somewhat less than 4 per cent. on the whole of these sums that I have mentioned, but if the separate creditors and the joint creditors are all paid 4 per cent. on their debts Cottier's claim will, to some extent, go short.

If the claim of Sir Charles Cottier's executors for principal is postponed to the claims of the separate and joint creditors for interest, there is enough to pay to both separate and joint creditors their interest at the statutory rate in full. The question is, are the separate and joint creditors entitled to say that the claim of the executors for principal is so postponed ? The executors contend that they are not so postponed and that they are entitled to be paid their principal before either the separate or joint creditors receive anything for interest. That, in my view, is a claim which the executors of Cottier are not entitled to make. If I were to allow that claim, I should be enabling Cottier's executors to procure for the benefit of his estate a diminution of the total amount which would otherwise be payable out of Howes' estate to creditors of Howes to whom Cottier is liable, and that seems to me to be contrary to the principles of bankruptcy. It is suggested that I can find something in s. 33 of the Bankruptcy Act, 1914, which, in some way, would assist me in holding in favour of the claim of Cottier's executors. I cannot find it. The principle appears to be well established by the older cases, and the principle seems to be, that just as a debtor cannot compete with his own creditors, so a partner of a debtor cannot compete with any of the debtor's creditors, so long as there are any creditors of that debtor not fully satisfied to whom the claimant is under liability. Here there are joint creditors not fully satisfied, for they are not fully satisfied until they have had not only their 20*s*., but also the 4 per cent. Accordingly, in my view the right course is that the separate and joint creditors will receive their 4 per cent. in full, upon the amounts of their respective debts for the time being outstanding; and what remains after that will be available to meet the claim of Sir Charles Cottier's executors.

Solicitors: *Morrish, Strode & Searle; Dod, Longstaffe & Fenwick; Lane & Cottier.*

H. C. H.

HILLS AND GRANT, LIMITED *v.* HODSON.

LUXMOORE J.
1933
May 24, 25, 29.

[1932. H. 4994.]

Contract—Sale of Land by Auction—Special Conditions of Sale—National Conditions of Sale—Claim by Vendor for Specific Performance—Defence that Purchaser only a puffer or dummy bidder—Contract signed by Purchaser—Sale subject to a reserve—Right of Vendor to employ a puffer—Effect of Sale of Land by Auction Act, 1867—*Amendment of Pleadings—Sale of Land by Auction Act,* 1867 (30 *&* 31 *Vict. c.* 48), *ss.* 4, 5, 6.

In a sale of certain property by auction, the defendant was declared to be the highest bidder, and he subsequently signed a written contract stating that he was in fact the purchaser of the property. The sale was subject to certain special conditions, clause 1 of which stated that the property was also sold subject to the National Conditions of Sale, and by clause 2 it was stipulated that in the event of the property remaining unsold or being bought in by the vendors, the vendors should be entitled to withdraw another lot from the sale. Clause 1 of the National Conditions of Sale provided that subject (inter alia) to the vendors bidding up to a reserve price, the highest bidder should be the purchaser.

In an action by the plaintiffs for specific performance of the agreement by the defendant to purchase the property, the defendant pleaded (1.) that he had agreed to bid at the sale merely as a puffer or dummy bidder on behalf of the vendors, and (2.) that the vendors had employed other puffers to bid on their behalf and that this employment was contrary to the Sale of Land by Auction Act, 1867, s. 6, and also to the conditions of sale.

The defendant at the trial contended that the sale was in fact one without reserve and therefore the vendors were precluded from bidding either by themselves or an agent by reason of the provisions of s. 5 of the Act.

Held, (1.) that the defendant in bidding for the property was bidding for himself and not as a dummy bidder for the plaintiffs; (2.) that the sale was subject to a reserve price; and (3.) that there was no contravention of the provisions of s. 6 of the Sale of Land by Auction Act, 1867. Sect. 5 of the Sale of Land by Auction Act, 1867, does not require that the words "with reserve" or "without reserve" and no others should be used in the particulars or conditions of sale. The requirements of the section are satisfied so long as it is made plain, in whatever words may be chosen, that the sale is subject to a reserve.

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Application to amend the pleadings by relying upon s. 5 of the Act refused.

On this point *James* v. *Smith* [1891] 1 Ch. 384 followed.

Action.

This was an action by the plaintiff company for the specific performance by the defendant of an agreement dated October 12, 1932, for the sale to and purchase by the defendant of certain freehold land situate at Potters Bar in the county of Middlesex.

The plaintiff company was the owner of certain freehold land situate at Potters Bar registered with an absolute title which they desired to sell for building purposes. Accordingly Messrs. Jarrett & Izod, a firm of auctioneers, were instructed to put the land in question up for sale by auction in three lots on October 12, 1932, and they duly prepared the necessary Particulars and Conditions of Sale. Lot 2, which was the property the subject-matter of the action, was described in the Particulars as a freehold site of about one and three-quarter acres, coloured green on the plan, and having a frontage of 534 feet to a road known as Mutton Lane, Potters Bar, Middlesex. There were certain special conditions of sale affecting the property, and by clause 1 of these special conditions it was provided as follows: "The property is sold subject to the following conditions and to the conditions known as the National Conditions of Sale, 11th edition (a print whereof may be inspected at the offices of the vendors' solicitors during the office hours of the five days immediately preceding the day of sale or at the auction room on the day of sale), so far as the latter conditions are not inconsistent with the following conditions." Clause 2: "In the event of Lot 2 remaining unsold or being bought in by the vendors, the vendors through their agents, the auctioneers, shall be entitled to immediately withdraw Lot No. 3 from the sale." Clause 5: "The vendors sell each lot as beneficial owners."

Para. 1, sub-para. 1, of the National Conditions of Sale (11th ed., issued January, 1930), which, as above stated, were incorporated in the special conditions of sale, provided that:

"Subject to a right for the vendor by himself or his agent to consolidate all or any lots, to re-arrange lots or divide the property into lots, to bid up to a reserve price, and to withdraw the property or any lot (not actually sold at the auction) without declaring such price, the highest bidder shall be the purchaser."

The sale by auction of Lot 2 and other property belonging to the plaintiff company subsequently took place on October 12, 1932, and at the sale the defendant was declared to be the highest bidder for and therefore the purchaser of Lot 2 at the price of 1385*l*. The agreement upon which the action was based was signed by the defendant over a 6*d*. stamp immediately after the sale in the following terms: "Memorandum:—I, Samuel Hodson of . . . . hereby acknowledge myself to be the purchaser of the property described in the within Particulars as Lot 2 at the price of £1385—0—0; . . . . Dated this 12th day of October 1932 . . . . S. Hodson."

After the sale an abstract of title to the property described in Lot 2 was duly delivered, but owing to the attitude taken up by the defendant completion was delayed. Correspondence on the subject ensued between the plaintiff company's solicitors and the defendant's. The defendant, however, not having carried out the agreement, the plaintiffs on January 2, 1933, issued a writ claiming as above stated (inter alia) specific performance by the defendant of the agreement of October 12, 1932.

The defendant by his defence contended that he bid at the auction merely as a puffer or dummy bidder, and he further relied on the Sale of Land by Auction Act, 1867, s. 6. (1) The defence was in the following terms:

"1. The defendant agreed to bid at the said sale by auction at the request of and relying upon representations made by one Izod, a partner in a firm named Jarrett & Izod acting as auctioneers and as agents for and on behalf of the plaintiffs. The request was made orally shortly before October 12, 1932, and the substance of such request was that the defendant should attend the said sale and bid for Lot 2 as a dummy bidder or puffer. The representation was made orally at the same time and was that the reserve figure would be higher than £3—2—0 per foot, and that the defendant would be all right (meaning that his bids would not be accepted and the property knocked down to him) if he kept to that figure. The defendant did not make any bid above that figure.

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(1) Sale of Land by Auction Act, 1867, s. 6: "And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper."

"2. The acceptance by the said auctioneers of the defendant's bid, declaring it the highest and the defendant the purchaser was a breach of the said agreement and a breach of faith and created no obligation upon the defendant. He signed the memorandum as a purely formal matter, it being well known to the said auctioneers and clearly understood by them that the defendant was to incur no obligation thereby.

"3. Further or in the alternative, the auctioneers were not entitled to lower the reserve price below that already fixed, but they did so during the progress of the bidding. The auctioneers consequently were not entitled to declare the defendant the purchaser.

"4. The said auctioneers employed other dummy bidders or puffers to bid for the said Lot 2 at the sale, and they did so bid. Save that the names of two of such puffers were Barrett and Warboys, the defendant cannot give further particulars under this paragraph until after discovery. Such employment and bidding were contrary to section 6 (1) of the Sale of Land by Auction Act 1867 and also to the conditions of sale, and rendered the said alleged sale fraudulent and invalid."

In certain amended further and better particulars of the defence, the defendant, after stating that the particulars given in some previous further and better particulars under para. 1 of the defence were not correct, alleged that the oral conversation between the defendant and one Izod took place partly on or about September 15, 1932, in the office of the said Izod at Potters Bar and partly on October 7, 1932, in Darkes Lane, Potters Bar, opposite the Oak Tree Café.

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(1) See note (1) ante, p. 55.

C. E. Shebbeare and *T. K. Wigan* for the plaintiffs.

F. R. Evershed K.C. and *F. W. Beney* for the defendant. There was no real agreement by the defendant to purchase on his own account. Further, the question arises, Is the sale avoided by reason of the Sale of Land by Auction Act, 1867, s. 6 (1)? The sale was one without reserve, the vendor could not therefore bid, nor any one authorized by him. The provision in the National Conditions of Sale enabling the vendor to bid up to a reserve cannot apply; there is no express mention in the special conditions that the sale is to be subject to a reserve: *Gilliat* v. *Gilliat.* (2) Further the vendor by informing the auctioneer that the reserve price had been reduced, really made a bid himself: *Parfitt* v. *Jepson.* (3) As to a reserve price see note to the General Conditions of Sale (1925) in Wolstenholme and Cherry, 2nd ed., p. 722; *Thornett* v. *Haines.* (4) Also s. 5 of the Act has not been complied with.

C. E. Shebbeare in reply. The contention put forward on behalf of the defendant is not well founded. The Sale of Land by Auction Act, 1867, has been sufficiently complied with. The Act authorizes the variation of an implied condition that the highest bidder shall be the purchaser: ss. 4, 5 and 6 of the Act. (5) Sect. 5 shows that the Act does not formulate the precise statement required, it only requires words which in effect show the purchaser which kind of sale it is to be.

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(1) See note (1) ante, p. 55.

(2) (1869) L. R. 9 Eq. 60.

(3) (1877) 36 L. T. 251.

(4) (1846) 15 M. & W. 367.

(5) Sale of Land by Auction Act, 1867, s. 4: " . . . . That from and after the passing of this Act whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

Sect. 5: " . . . . That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

Sect. 6: " And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper."

As regards the National Conditions of Sale, 11th ed., they are to apply in this case so far as they are not inconsistent with the special conditions. When nothing is said about bidding or a reserve in the special conditions, condition 1 of the National Conditions cannot be inconsistent; there is nothing for it to be inconsistent with and it must apply. If a further statement is required it is found in two places—namely, first, in para. 1 of the defence, where the verbal statements are pleaded. A sale by auction is verbal, and the signing of a contract in writing is only required by the Statute of Frauds. Verbal information binds a purchaser as much as printed conditions: *Farebrother* v. *Gibson*. (1) Secondly, in special condition 2, where it is stated that the property in question may be "bought in" by the vendors. What then does this condition amount to? Coupled with the National Conditions, it can only amount to a statement in effect that until a reserve is reached the vendor can buy in by bidding up to it. Compare *Parfitt* v. *Jepson*. (2)

Further, if the Act has not been complied with the sale is voidable at the option of the purchaser and not void. A voidable contract can be affirmed or rejected, and in this case the defendant has affirmed it: Webster on Conditions of Sale, 3rd ed., p. 168. The defendant knew as a fact that there was a reserve and pleaded it expressly in the defence: see para. 3. If he knew there was a reserve, by his subsequent bidding he waived the requirements of the statute, and even if, when he bid, the verbal contract so made was voidable, he affirmed it by the subsequent written contract to which, with full knowledge of all the material facts, he deliberately signed his name.

It is alleged in the defence that the defendant only agreed to bid as a dummy bidder. The Sale of Land by Auction Act, 1867, was pleaded only in para. 4—and that paragraph specifies s. 6. The plea in the defence is not that no right to bid was

(1) (1857) 1 De G. & J. 602.

(2) (1877) 36 L. T. 251.

reserved but that more than one person was employed as a puffer. The plea presupposes that a right to bid was reserved. If it is contended on behalf of the defendant that s. 5 of the Act of 1867 (1) has not been complied with, because the conditions omitted to state that there would be a reserve, the defence should have alleged the fact: see Order XIX., r. 15. Otherwise this point comes by way of surprise and the Court will not at this stage allow an amendment: see *James* v. *Smith*. (2) The defence might have pleaded the statute generally or s. 5. It is useless to plead s. 6, and on the one point only, if the real point involves the requirements of s. 5. The only questions on these pleadings are; whether the defendant was a purchaser or merely a puffer or dummy bidder, and if he was a purchaser, whether more than one puffer was employed. Sect. 5, although relied on, has not been pleaded, and no facts have been alleged on which the contention now made on behalf of the defendant can be put forward: see the remarks of Fry J. in *Collette* v. *Goode* (3) which are relied on.

F. R. Evershed K.C. replying. The facts show that the vendors did not reserve to themselves a right to bid, and it is not a question of relying on s. 5 of the Act of 1867. (1) As regards the conditions of sale, a statement in a contract or conditions of sale that a vendor reserves to himself a right to buy in property is not the same as reserving a right to bid. If necessary, it is submitted an amendment of the defence should be granted by the Court.

LUXMOORE J. The plaintiff company seeks specific performance of an agreement in writing dated October 12, 1932, by which the defendant agreed to purchase certain land at Potters Bar for the sum of 1385*l*. The agreement in question was signed after the property had been knocked down to him at an auction, he having admittedly made the highest bid for it. The defence is an unusual one. First of all it is said that the agreement is a nullity, because the defendant, at the

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(1) See note (1) ante, p. 57.
(2) [1891] 1 Ch. 384, 389.
(3) (1878) 7 Ch. D. 842, 847.

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request and to the knowledge of the auctioneers, bid at the auction merely as a puffer or dummy bidder, and secondly it is said that the agreement is invalid, because the provisions of the Sale of Land by Auction Act, 1867, have not been complied with.

The first question is purely one of fact and there is a conflict of evidence with regard to it. The defendant in the witness-box gave a circumstantial account of his appointment by Mr. Izod, a member of the firm of auctioneers who had the conduct of the sale, as a dummy bidder on behalf of the vendors. According to his evidence the matter was discussed on two occasions. [His Lordship, having fully considered the evidence, continued :] On this question I hold that the defendant in bidding for the property was acting for himself and not as a dummy bidder for the plaintiffs, and that he signed the contract for the purchase in his capacity as a purchaser. The subsequent repudiation and the story with regard to it are, I think, an afterthought.

The case, however, does not rest there. The Sale of Land by Auction Act, 1867, provides by s. 4 : "That from and after the passing of this Act whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." A puffer is defined by s. 3 to mean "a person appointed to bid on the part of the owner." Sect. 5 provides : "That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved ; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." Sect. 6 provides : "And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper."

The question which I have to determine is whether the provisions of that Act have been infringed. So far as the pleadings are concerned, the defence is confined to s. 6 of the Act, which provides that where there is a right for the seller to bid, the bidding shall only be lawful if it be made by the seller or one person on his behalf, for the pleadings expressly refer to the sale as a sale subject to a reserve. It is impossible to find any suggestion in the pleadings that the sale was without reserve. The point is raised in para. 4 of the defence, which is in these words: "The said auctioneers employed other dummy bidders or puffers to bid for the said Lot 2 at the sale and they did so bid" . . . . "Such employment and bidding were contrary to section 6 of the Sale of Land by Auction Act, 1867, and also to the Conditions of Sale, and rendered the said alleged sale fraudulent and invalid."

Mr. Evershed in the course of his argument raised the point that the sale was without reserve, and contended that the vendors were therefore precluded from bidding at the sale either by themselves or their agent. The word "reserve" is not used in the particulars and conditions of sale, but they incorporate the 11th edition of the National Conditions of Sale, which provide by condition 1 that: "Subject to a right for the vendor by himself or his agent to consolidate all or any lots, to re-arrange lots or divide the property into lots, to bid up to a reserve price, and to withdraw the property or any lot (not actually sold at the auction) without declaring such price, the highest bidder shall be the purchaser." Mr. Evershed contended that as there is no express mention that the sale is to be subject to a reserve, the provision in the National Conditions reserving to the vendor the right to bid up to a reserve is inapplicable to the present case, because it applies only if it is expressly stated that the sale is to be with a reserve price, and that there is only then liberty to bid up to it.

In my judgment the Act does not require that the words "with reserve," or "without reserve," and no others shall be used in the particulars or conditions of sale. Sect. 5 contains this provision: " . . . . if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, ..." I think this provision shows that the conditions of the Act are complied with so long as it is made plain, by whatever words may be chosen, that the sale is subject to a reserve. In the present case the special conditions of sale contain a condition which, read in conjunction with the rest of the conditions, including the National Conditions of Sale, makes it clear that the property was being sold with a reserve price. As I have said, condition No. 1 of the special conditions of sale provides that: "The property is sold subject to the following Conditions, and to the Conditions known as the National Conditions of Sale, 11th Edition"—"so far as the latter Conditions are not inconsistent with the following Conditions." Special condition No. 2 is: "In the event of Lot 2"—that is the property in dispute in this action—"remaining unsold, or being bought in by the Vendors, the Vendors, through their Agents the Auctioneers, shall be entitled to immediately withdraw Lot No. 3 from the Sale." What do the words "remaining unsold, or being bought in" mean? "Remaining unsold" means that the property is not knocked down to any one. "Being bought in" means being bought by the vendors. That can only mean being bought in by the vendors under the right that they have reserved to bid up to a reserve price. If property is put up for sale without any reserve at all it cannot be bought in, and therefore I think that on these special conditions, incorporating the National Conditions of Sale, it is made sufficiently plain that the property is being sold with a reserve. Further it is plain that the defendant himself knew that the property was being sold with a reserve, and indeed his whole defence is based on the fact that the sale was a sale subject to a reserve.

The question arose whether it was open to the defendant to raise this point at the trial as it was not referred to in the pleadings. Order XIX., r. 15, provides: "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." In the present case the defendant has pleaded that certain things contravene a particular section of the Sale of Land by Auction Act, 1867. The section which he says is contravened is s. 6, which provides that where the sale is a sale with a reserve, not more than one "puffer," or dummy bidder, shall be employed on behalf of the vendor. Having regard to the provisions of this rule I do not think that it was open to the defendant to raise the point that the sale was in fact a sale without reserve and therefore that no dummy bidder was allowed to be employed on behalf of the vendors. To allow amendment of the pleadings at such a late stage in the proceedings would give the defendant an opportunity to take advantage of a pure technicality, and I declined to do so. The decision in *James* v. *Smith* (1) is in point. There the defendant had relied upon s. 4 of the Statute of Frauds. At a late stage in the action, having failed to bring the case within s. 4, he wished to rely upon s. 7. Kekewich J. refused to allow any such amendment. In the course of his judgment he said: "By Order XIX., r. 15, the Defendant is bound to plead the Statute of Frauds if he intends to rely on it—but the rule does not oblige him to plead the particular section. Here the Defendant has pleaded the 4th section; and it is admitted now that on the 4th section he must fail, and that he must rely on the 7th section. Then I am asked at the last moment to allow an amendment to be made so that his defence may read that he will rely on the 7th section . . . . A party relies on a particular section of the statute, and when he finds the authorities to be against

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(1) [1891] 1 Ch. 384, 389.

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him he says: 'I should like to rely on something else.' To sanction that would, it seems to me, make pleading even more loose than it is at present, and I think I ought not to allow that amendment. Therefore, although I hold the 7th section of the Statute of Frauds to be applicable, I think it is not properly pleaded, and is not available to the Defendant." Applying that to the present case, the defendant here relies on s. 6 of the Sale of Land by Auction Act, 1867. That section having failed him, he wishes to rely on s. 5. I have already held that s. 5 does not apply to this case, but if I am wrong in that, it would be improper to allow any amendment so that that section could be relied upon.

There was one other point raised by Mr. Evershed with which I ought to deal, and that is that there was in fact more than one person bidding at this sale on behalf of the vendors. It was admitted that a Mr. Warboys was bidding as the agent for the vendors. Mr. Evershed argued that the vendors, by notifying to the auctioneer that the reserve price had been reduced, in fact made a bid themselves, and he relied on the case of *Parfitt* v. *Jepson* (1) in support of his argument. I do not think that what happened with regard to the lowering of the reserve in the present case operated as a bid by the vendors at all. The evidence with regard to it was that when Mr. Warboys, the dummy bidder, had made his bid of 1375*l.*, the vendors notified the auctioneer that he could from that time onwards accept any bid and sell the property. Mr. Jarrett, the auctioneer, being so notified, stated more than once in the auction-room, that he was going to sell if a further bid of 10*l.* were made. He asked the defendant to make that bid, and Mr. Hodson made it as I hold after having heard what the auctioneer had said. These circumstances differentiate the case from *Parfitt* v. *Jepson*. (1) There was a suggestion that there was some person other than Mr. Warboys bidding at the auction. Mr. Hodson said that the auction was opened by some young man with a ridiculous bid. It was suggested that he was some one who had been employed for, or on behalf of the vendors to start the bidding. Both the auctioneer and Mr. Izod said that they heard no such bidding. Further, there was no evidence if such a bid was made that the person who made it was the agent for the vendors.

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(1) 36 L. T. 251.

The plaintiffs have succeeded in establishing the contract. I therefore make the usual order for specific performance. The defendant must pay the costs of the action.

Solicitors: *Greenwood & Son; Freke Palmer, Romain & Romain.*

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[1932. H. 5034.]

Contract—Specific Performance—Contract under Seal—Contract by Agent—Agency denied—Release of Agent by Vendors—Action by Principals against Agent and Vendors for declaration of Agency and Specific Performance of Contract—Parties—R. S. C. Order XVI, *r.* 11.

By an agreement under seal the defendant A agreed to purchase from the defendants the V. Co. and H.V. and L.V. the copyright in certain periodicals. The plaintiffs asserted that this agreement was entered into by the defendant A as agent and trustee for the plaintiffs and himself, which the defendant A denied. The agreement was (with notice of the plaintiffs' claim) subsequently rescinded by the parties thereto and the property sold to the defendant S. The plaintiffs thereupon brought the present action against the defendants A, the V. Co., H.V. and L.V. and S. claiming a declaration that the defendant A entered into and held the benefit of the agreement as agent and trustee for the plaintiffs and an order for specific performance of the agreement.

Held, by Maugham J., on the facts, that the defendant A entered into the agreement as agent and trustee for the plaintiffs and himself; but he dismissed the action as against the other defendants on the ground that the agreement being under seal and the plaintiffs not being parties thereto they could not specifically enforce it, save in separate proceedings after obtaining leave of the Court to sue in the name of the defendant A.

On an appeal by the plaintiffs and a cross-appeal by the defendant A.

Held, by the Court of Appeal (affirming the decision of Maugham J.), that the agreement was entered into by the defendant A as agent and trustee for the plaintiffs and himself.

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But *held* (reversing the decision of Maugham J.), that as all the parties to the agreement were before the Court, the fact that it was under seal did not prevent the plaintiffs from enforcing it in this action, when the agency of the defendant A had been established, and that as the defendant A (having been found to be agent and trustee) was willing that the agreement should be carried out, the Court would decree specific performance thereof.

WITNESS ACTION.

In this action the plaintiffs Henry Revell Harmer and Charles Whitfield King claimed against the defendant Douglas Brown Armstrong a declaration that the defendant Armstrong entered into and held the benefit of an agreement dated December 15, 1932, as agent and trustee for each of the plaintiffs as to two-fifth parts and for himself as to one-fifth part of the property therein comprised: and they further claimed against the defendants the Vallancey Press, Ld., Francis Hugh Vallancey and Lucy Vallancey specific performance of the agreement, and also an injunction restraining all the defendants to the action except the defendant James Arthur Chester Sumner from disposing of or dealing with the property comprised in the agreement save with the plaintiffs' consent and an order on the defendants to assign or procure the assignment of that property to the plaintiffs and the defendant Armstrong or their nominee or nominees.

The facts were shortly as follows:—The Vallancey Press, Ld., owned among other assets five philatelic periodicals. Two of its directors were the defendant F. H. Vallancey, who owned, in effect, all the shares, and the defendant Armstrong. About November, 1932, the defendant F. H. Vallancey decided that the five periodicals should be sold. The defendant Armstrong, to whom the defendant F. H. Vallancey had promised a first refusal, approached the plaintiff Harmer, who became interested and enlisted the interest of the plaintiff King. In November, 1932, the plaintiff Harmer authorized the defendant Armstrong to make a definite offer for the periodicals, which he did. After negotiations the offer was accepted, and it was arranged that each plaintiff should provide two-fifths and the defendant Armstrong one-fifth of the purchase money and that the property should be transferred to a company to be formed in which each plaintiff should hold two-fifths and the defendant Armstrong one-fifth of the shares. On December 15, 1932, the agreement, which was under seal, was entered into between the Vallancey Press, Ld., of the first part, the defendants F. H. Vallancey and Lucy Vallancey of the second part and the defendant Armstrong of the third part. About six days later the plaintiff Harmer and his son discussed with the defendant Armstrong a draft service agreement for the employment of the defendant Armstrong who, after the interview, took the draft away for discussion with his solicitors. On December 22, 1932, the defendant Armstrong's solicitors wrote to the plaintiffs' solicitor that the defendant Armstrong was not prepared to accept the terms of the service agreement, and that the negotiations between him and the plaintiffs must be considered at an end. To that the plaintiffs' solicitor replied that the defendant Armstrong had entered into the agreement for sale as agent for himself and the plaintiffs, who proposed to complete the purchase. The defendant Armstrong's solicitors, in a further letter, described that assertion as a ridiculous suggestion which the defendant Armstrong repudiated, and about the same time the defendant Armstrong wrote asking the Vallancey Press, Ld., to release him from the agreement for sale. The writ in this action was issued on December 31, 1932. At a board meeting held on January 5, 1933, the Vallancey Press, Ld., did release him from it, and, on the next day, entered into a contract with the defendant Sumner for the sale of the five periodicals to him.

The action came before the Court on March 29, 1933.

C. E. E. Jenkins K.C. and *A. J. Belsham* for the plaintiffs. The defendant Armstrong entered into the agreement and held the benefit of it as trustee for the plaintiffs and himself. *Stocker* v. *Wedderburn* (1) is not like the present case. There the plaintiff was a party to the written agreement which he sought to enforce, and he failed because the Court could not have enforced against him specific performance of his own undertakings in that agreement. Here the plaintiffs are not parties to the agreement, and as Mr. Armstrong has denied the trusteeship they are entitled to succeed as against the other parties to the agreement, despite the fact that it is under seal. They are entitled to specific performance of it, which they can obtain by making all the parties to it defendants to this action, as they have done: see *Gandy* v. *Gandy* (1); also *Taylor* v. *Salmon* (2); *Page* v. *Cox* (3); *In re Franklin and Swathling's Arbitration* (4) and *In re International Contract Co., Pickering's Claim.* (5)

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(1) (1857) 3 K. & J. 393.

Cleveland-Stevens K.C. and *E. E. H. Brydges* for Mr. Armstrong. The agreement was preceded by Mr. Harmer and Mr. Armstrong orally agreeing that the property should be purchased, the company formed, and Mr. Armstrong appointed managing director. The agreement thus comprised a whole and indivisible contract, including the appointment of Mr. Armstrong as managing director. In fact, however, the agreement so appointing him was never executed. Therefore, contrary to the argument for the plaintiffs, the principle in *Stocker* v. *Wedderburn* (6) does apply, and there exists no contract whereof specific performance can be decreed as against Mr. Armstrong.

Sir Herbert Cunliffe K.C. and *Walter Banks* for the Vallancey Press, Ld., Francis Hugh Vallancey and Lucy Vallancey, and Mr. Sumner. It has not been established that Mr. Armstrong contracted on behalf of the plaintiffs, and there is no complete contract so far as the Vallancey Press is concerned. In order to succeed the plaintiffs must prove that they are in a position to sue the Vallancey Press, Ld., and that the Vallancey Press, Ld., is in a position to sue them. See Bowstead on Agency, 8th ed., p. 311, Article 92; Norton on Deeds, 2nd ed., p. 28; *Forster* v. *Elvet Colliery*

(1) (1885) 30 Ch. D. 57.
(2) (1838) 4 Myl. & Cr. 134.
(3) (1852) 10 Hare, 163.
(4) [1929] 1 Ch. 238.
(5) (1871) L. R. 6 Ch. 525.
(6) 3 K. & J. 393.

Co. (1); *Chesterfield, &c., Colliery Co.* v. *Hawkins* (2); *Gandy* v. *Gandy* (3); Article 92 in Bowstead on Agency is headed "Deeds" and is as follows: "No principal may sue or be sued on any deed, even if it is expressed to be executed on his behalf, unless he is described as a party thereto and it is executed in his name. This article is subject to the 123rd section of the Law of Property Act, 1925, which provides that every assurance, instrument and thing executed and done by the donee of a power of attorney in and with his own name and signature and his own seal, by the authority of the donor of the power, shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor." It would have been quite impossible for any of the defendants to enforce the agreement against either of the plaintiffs. The plaintiffs are not parties to the agreement and therefore, as it is under seal, it cannot be enforced by or against them.

C. E. E. Jenkins K.C. in reply.

Cur. adv. vult.

April 7. MAUGHAM J., after stating the facts in detail, continued: The first question that arises is whether the defendant Armstrong, in entering into the agreement of December 15, 1932, was acting as agent for the plaintiffs or either of them or was in a fiduciary position towards them. It is argued on his behalf that, having regard to the circumstance that the terms of the agreement of service between him and the proposed company were never agreed and that he never approved the form of the memorandum and articles of association, he is not bound to the plaintiffs in any way and that the case is one where the contract which was in negotiation between him and the plaintiffs is incomplete and therefore not enforceable. In my opinion this is not the correct view. The test on the point of taking the defendant Armstrong to have been acting for and on behalf of the plaintiffs is not whether something remained to be done after the contract for purchase had been entered into, but whether the said defendant was entitled after entering into the contract to compel the plaintiffs to subscribe their shares of the purchase money: and, having regard to the facts which I have stated, I find it impossible to come to any conclusion other than that he was so entitled. The consequence is that he must in my view be treated as having entered into the contract as agent for and in a fiduciary position towards the plaintiffs with the result that, as between him and them, he was bound to complete the contract in due course with their financial assistance and was committing a breach of his duty and his trust towards them in purporting or attempting to rescind the agreement.

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(1) [1908] 1 K. B. 629.

(2) (1865) 3 H. & C. 677.

(3) 30 Ch. D. 57.

The next question that arises is whether in the circumstances the plaintiffs are entitled to enforce specific performance of the agreement in a proceeding in which they are the plaintiffs and the defendant Armstrong and the Vallancey Press, Ld., are defendants. On behalf of the Vallancy Press, Ld., the technical point is taken that the agreement, being under the seal of the defendant Armstrong and of the other parties to it, as one where the plaintiffs are not included, cannot be enforced either by or against the plaintiffs. It is well known that an undisclosed principal may sue or be sued in his own name on any contract duly made on his behalf, and it seems clear that such an undisclosed principal can sue for and obtain specific performance of a contract in equity subject only to this, that, if the contract has been entered into with an agent by reason of considerations as to the personal qualities of the agent or under circumstances which would make it impossible for the agent to claim specific performance, that special relief would not be granted (see Fry on Specific Performance, 6th ed., c. 6.) To the general rule there is, however, a curious exception in the case of a contract under seal entered into by an agent, even where the agent is described as acting on behalf of a named principal. (See Bowstead on Agency, 8th ed., p. 311; Halsbury's Laws of England, 2nd ed., Vol. I, p. 280; Pollock on Contracts, 9th ed., p. 106.) In such a case the principal can neither sue nor be sued upon it, the rule being that the parties are determined exclusively by the form of the instrument. The reason for the rule is not to my mind a very satisfactory one, but the rule itself is perfectly well settled and it is not affected so far as the present case is concerned by s. 123 of the Law of Property Act, 1925. I am bound by authority to hold that, although in equity the substance of the transaction rather than the form is generally regarded, yet in this case the technical rule is applied. In *In re International Contract Co., Pickering's Claim* (1) the Court of Appeal refused to give effect to an agreement under seal which was obviously entered into by one of the parties to it for and on behalf of a company of which he was the managing director. The sum involved was very large, the counsel engaged were of great eminence and Sir Roundell Palmer argued for the appellant that in equity the company could be held liable: but James and Mellish L.JJ. concurred in the view that since the agreement was under seal the only person who could be sued was the agent who had entered into the agreement. It was observed that if a lessee assigns a lease to a trustee for a third party and the trustee covenants with the assignor to indemnify him, the assignor has accepted the trustee as the party liable and has no equity to proceed against the cestui que trust. I have been unable to distinguish this and other cases which I have examined from the present one. The plaintiffs rely on the well-known decision in *Gandy* v. *Gandy* (2), but there, according to my understanding of the case, the wife was held entitled to sue on a somewhat special ground, namely that on the face of the separation deed it was manifest that the money was to be paid for the benefit of the wife.

I have come to the conclusion that the Vallancey Press, Ld., are entitled to take the point that they entered into the agreement under seal to sell their property to the defendant Armstrong and that they were not and are not bound to recognize the rights of any third party. In saying this I do not mean, of course, to indicate that the plaintiffs were deprived of all right to enforce the contract, but I think their proper course was to apply in the matter of the trust for leave to sue in the name of Mr. Armstrong, and if that leave had been obtained the action would have been one as between Armstrong and the Vallancey Press, Ld., to which there would have been no objection on the ground of parties. It is true that in some cases if a trustee refuses to join in an action his beneficiaries may sue making him a defendant in addition to any other necessary defendants; but there is no universal rule to that effect (see *Yeatman* v. *Yeatman* (1) and *Meldrum* v. *Scorer* (2)), and if the contract made by the trustee is made under seal my opinion is that the proper parties to sue and to be sued, in equity as in law, are determined exclusively by the form of the instrument. I may add that I have not been referred to and I cannot find any authority or dictum in favour of the contention that the rule is not applicable in equity, and it seems to me that the decision in *In re International Contract Co., Pickering's Claim* (3) is opposed to it.

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(1) L. R. 6 Ch. 525.

(2) 30 Ch. D. 57.

A number of other points were argued on behalf of the defendants which did not appear to me as possessing much weight, but, having regard to the conclusion at which I have arrived as above, I do not think it is necessary for me to express any final opinion in regard to them. My conclusions must be, first, that the defendant Armstrong committed a breach of trust in writing his letter of December 28, 1932, and requesting the Vallancey Press, Ld., to release him from his agreement and return his deposit. The consequence of this action on his part was the rescission of the contract on January 5, 1933, and a fresh contract entered into on the following day with the defendant Sumner.

The plaintiffs, in my opinion, are entitled if they press for it to have an enquiry to ascertain the amount of damage they have suffered by this breach of trust or agency committed by the defendant Armstrong. On the other hand the plaintiffs

(1) (1877) 7 Ch. D. 210.
(2) (1887) 56 L. T. 471.
(3) L. R. 6 Ch. 525.

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are not, in my opinion, entitled to a judgment for specific performance and the action against the defendants other than the defendant Armstrong must be dismissed.

K. R. A. H.

C. A.

The plaintiffs appealed. The appeal was heard on July 21, 24 and 25, 1933.

C. E. E. Jenkins K.C. and A. J. Belsham for the appellants. We admit the common law rule that where a contract is under seal only the parties to it can sue and be sued, but we submit that that rule does not apply to the present case.

The questions which arise on this appeal are two: (1.) Did the defendant Armstrong enter into the contract in a fiduciary capacity and (2.) did the Valanceys when they released the defendant Armstrong from the contract know of the claim of the appellants.

The judge would have decided the case in the appellants' favour but for the technical objection that the contract was under seal. That fact it is submitted makes no difference. The appellants' claim against the Valanceys is through the defendant Armstrong and if it should be held by the Court that Armstrong was not a trustee for the appellants their claim must fail.

It is not contended that the old rule has gone, but although no reported case is to be found where a cestui que trust has sued where the contract is under seal there must have been such cases.

In *Luke* v. *South Kensington Hotel Co.* (1) it was laid down that one of several mortgagees could maintain an action to foreclose the mortgage, making the others co-defendants if they were unwilling to be joined as co-plaintiffs, or had done some act precluding them from being plaintiffs.

The principle of that case was applied in *Cullen* v. *Knowles* (2), where it was held that one of two joint promisees could maintain an action on the contract, making the other joint promisee a co-defendant if, after tender of an indemnity

(1) (1879) 11 Ch. D. 121.

(2) [1898] 2 Q. B. 380.

against costs, he refused to be joined as a co-plaintiff. That was the case of a simple contract.

[ROMER L.J. This is a case which involves the payment of further money. Have the appellants any right as against the defendant Armstrong to compel him to pay further money ?]

It is sufficient for our purpose that at the time he entered into the contract he was trustee for the appellants.

[ROMER L.J. At the present moment what right have the appellants to enforce their views as against Armstrong ?]

The test is what was the position of Armstrong when he entered into the contract.

Where a person is entitled to use the name of another the practice is now to allow the person so entitled to sue : see *Vandepitte* v. *Preferred Accident Insurance Corporation of New York.* (1)

Why should not that principle apply where the contract is under seal ?

[LORD HANWORTH M.R. I think the principle of the common law rule proceeds on the ground that you cannot contradict the terms of the deed.]

We are not seeking to add to or contradict anything in the deed.

[ROMER L.J. A patent can be enforced by the owner of it if he makes the patentee a party to the action, and a patent is under seal.]

[LORD HANWORTH M.R. referred to *Beckham* v. *Drake.* (2)]

We are not seeking to evade the rule of law.

[LAWRENCE L.J. In the case of a deed you cannot sue without having all the parties before the Court.]

The defendant Armstrong having entered into the agreement to purchase on behalf of the plaintiffs and himself did so in a fiduciary capacity and had therefore no power to rescind it without the plaintiffs' consent. It is well settled that a person cannot enter into a contract for his own benefit while he continues to act as an agent in regard to the same subject-matter : *Taylor* v. *Salmon* (3) ; *Luddy's Trustee* v. *Peard.* (4)

(1) [1933] A. C. 70, 78, 79.

(2) (1841) 9 M. & W. 79, 91, 95.

(3) 4 My. & Cr. 134.

(4) (1886) 33 Ch. D. 500.

The question is whether Armstrong could rescind and so put an end to an asset in which he only had a one-fifth interest, and being in a fiduciary position in regard to the remainder he clearly could not.

In these circumstances there is a continuing right to specific performance of the agreement and the only question is whether the plaintiffs by themselves are entitled to obtain this relief. It is contended that they are entitled to sue and obtain specific performance in these proceedings as Armstrong is a defendant. When a trustee is unwilling to enforce the rights of his cestuis que trusts, they can themselves enforce them in proceedings to which the trustee is made a defendant. *In re International Contract Co., Pickering's Claim* (1) is a converse case and has no bearing on the present case, but the principle is well established: See *Gandy* v. *Gandy* (2); *Yeatman* v. *Yeatman* (3); *Meldrum* v. *Scorer* (4); *Travis* v. *Milne* (5); *Beningfield* v. *Baxter* (6). Compare also *Royal Exchange Assurance* v. *Hope*. (7) The view has always been taken that technicalities must give way to justice, and accordingly that a cestui que trust can sue provided that his trustee is brought before the Court.

[Lord Hanworth M.R. referred to *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*. (8)]

Lord Wright in giving the judgment of the Court in that case exactly states the principle relied upon. It is a rule of convenience and the present is a strong case for its application. It is not a case where the trustee is merely refusing to sue, but he has been saying that the contract was entered into by him for his sole benefit. The fact that the contract here was under seal makes no difference: *Gandy* v. *Gandy*. (2)

Cleveland-Stevens K.C. and *E. E. H. Brydges* for the respondent Armstrong (on his cross-appeal). It ought not to be imputed to this respondent that he entered into the contract which put an end to his position in the old company without

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(1) L. R. 6 Ch. 525.
(2) 30 Ch. D. 57.
(3) 7 Ch. D. 210.
(4) 56 L. T. 471.
(5) (1851) 9 Hare 141, 150.
(6) (1886) 12 App. Cas. 167.
(7) [1928] Ch. 179.
(8) [1933] A. C. 70, 79.

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securing his position for the future. What he alleged was that there was an oral agreement between him and the plaintiffs relating to these matters, viz. (1.) purchase of the periodicals in shares, (2.) formation of a company to acquire the rights in the periodicals and (3.) appointment of the respondent to be managing director. The learned judge has found that there never was any concluded contract with regard to the respondent's being managing director. The result is that the agency as a whole was never concluded and that when Armstrong agreed to purchase from the Vallancey Press, Ld., he did so without having entered into any concluded arrangement with the plaintiffs. He must therefore have entered into the agreement to purchase on his own account and was free to rescind it. The whole issue therefore is whether at the time of the agreement to purchase there was a concluded contract between Armstrong and the plaintiffs. The effect of the evidence is, it is contended, to show that there was not; and this view is supported by the correspondence which contains negotiations which never resulted in the plaintiffs and Armstrong being ad idem.

Sir Herbert Cunliffe K.C. and *Walter Banks* for the respondents other than the respondent Armstrong.

These respondents are entitled to contend that the judgment of Maugham J. can be supported on two grounds: (1.) that already advanced by Mr. Cleveland-Stevens, and (2.) that expressed by Maugham J. The matter has been put as if it was a case of trustee and cestui que trust but on Maugham J.'s finding the relation between the defendant Armstrong and the plaintiffs is either that of agent and principal or that of co-partnership. It is an incident of the law of co-partnership and of principal and agent that a partner or an agent is accountable for what he acquires; but there must be some agreement or document from which the duty to account arises by express provision or by implication. Here there is no such agreement between the plaintiffs and Armstrong.

[ROMER L.J. Harmer authorised Armstrong to make an offer to purchase?]

It is plain that the whole matter was in suspense till the relation between the plaintiffs and Armstrong had been established. It would be going much too far to say that the plaintiffs ever authorised Armstrong to enter into a contract on their behalf.

Again it has never been held that any one but a party to an agreement under seal can sue on it.

[LAWRENCE L.J. Mr. Jenkins admits that only the parties can sue, but he contends that the plaintiffs can sue through Armstrong, a party to the agreement, and that instead of going to the Court to get leave to sue in his name they can sue in proceedings to which Armstrong is made a party.]

It has never been so held. In the case of a deed under seal a beneficiary is only allowed to sue if he is disclosed as such on the face of the deed. Here the Court is being asked to give specific performance in the very proceedings in which it has been decided that the plaintiffs are beneficiaries who could obtain leave to sue in Armstrong's name.

[LORD HANWORTH M.R. referred to *Gandy* v. *Gandy* (1) as a case in which a beneficiary not named in the separation deed was allowed to sue.]

The daughters of the husband and wife were indicated clearly as beneficiaries in the deed and the case is really therefore no exception to the general rule.

The judge was right in dismissing the action against these defendants on the ground that where a contract is under seal an action can be brought on it only by parties to it. That rule has never been relaxed except where there is a beneficiary disclosed on the face of the deed and only then in special circumstances. Here there is no beneficiary disclosed.

[ROMER L.J. referred to *Cope* v. *Parry*. (2) I do not know of any case in which it has been held that a beneficiary cannot bring an action unless he is mentioned in the deed. In *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (3) Lord Cave said : " It was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when the plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action."]

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(1) 30 Ch. D. 57.
(2) (1821) 2 J. & W. 538.
(3) [1924] A. C. 1, 14.

If a beneficiary is entitled to sue you must bring the person in whom the legal right is vested before the Court.

The cases in which the rule has been applied are summed up in Bowstead on Agency, 8th ed., p. 311.

There was here no transfer of property. All that Armstrong obtained was a chose in action against the Vallanceys.

If the rule is a rule of law it is not for the Court to inquire why it exists.

[Lord Hanworth M.R. referred to *Cooke* v. *Cooke*. (1)]

That case is not a very satisfactory authority for the proposition that a beneficiary not named in the deed can sue.

Pickering's Claim (2) is a decision of the Court of Appeal and, if right, supports the rule for which we contend. The rule is not a mere rule of construction but is one of positive law: *Chesterfield, &c., Colliery Co.* v. *Hawkins*. (3)

C. E. E. Jenkins K.C. was not called upon to reply.

Lord Hanworth M.R. This appeal must be allowed. It raises an important point which has been well presented by counsel on both sides.

The plaintiffs in the action sought a declaration that the defendant entered into and took the benefit of the agreement of December 15, 1932, as agent and trustee for the plaintiffs and himself. They also asked for specific performance of the agreement. The reason why the action was brought is thus stated by the plaintiffs in para. 7 of their statement of claim: "The defendants wrongfully deny that the plaintiffs have any beneficial interest in the said agreement of December 15, 1932, and the defendant Armstrong wrongfully asserts that the same was entered into on his behalf alone. At some time subsequently to December 28, 1932, the defendants (other than the defendant Sumner) wrongfully purported to rescind the said agreement of December 15, 1932, and they allege that a further agreement for the sale of the property comprised therein has been entered into with the defendant Sumner. Such purported rescission was in the circumstances hereinbefore set out ineffective and the interest of the defendant Sumner under any such further agreement is subject to the interest of the plaintiffs in the said agreement of December 15, 1932."

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(1) (1687) 2 Vern. 36; 1 Eq. Cas. Abr. 73, pl. 8.

(2) L. R. 6 Ch. 525.

(3) 3 H. & C. 677, 693.

Shortly, the facts are these. The defendants, the Vallancey Press, Ld., were the owners of certain papers, papers which dealt specially with philately—that is the business of stamp collectors and dealers in stamps. I think the defendant Armstrong was, either as assistant editor or as manager or assistant manager, concerned in helping the production of those papers. He learned some time in November of 1932 that the Company, which was then the owner, was prepared to sell those papers and it was an opportunity for some one who could put energy and some money into them to develop them. But Armstrong was unable of his own resources to purchase and the consequence was that he turned about to try to find some one who would assist in the purchase. At first he went to the City. He was unable to obtain assistance there. Ultimately he came to the plaintiff Harmer. Armstrong did not know and did not see the plaintiff King, but his negotiations were carried on with Harmer alone. Harmer entertained the project and ultimately (to make a long story short) Harmer gave authority to Armstrong to offer a sum of 1500*l.* as the purchase price for these papers. It would be necessary to find a little more than the actual purchase price and 2000*l.* was the figure which was contemplated as being necessary to carry the enterprise to success. That sum was to be obtained by Harmer and King putting up 800*l.* apiece and Armstrong putting up 400*l.*; that is to say, taking 2000*l.* as a total, Harmer and King were each to provide two-fifths and Armstrong one-fifth. The learned judge, who has gone through the facts more carefully than I have, tells us this—and I understand that there is no objection on the part of the counsel for Armstrong to this statement—" that Mr. Harmer was quite ready and willing to authorise Mr. Armstrong to make a definite offer for the papers in question and he did so authorise him." [His Lordship referred to evidence given by Armstrong as to the inception of the contract and continued :] The evidence abundantly shows that Armstrong was unable of his own resources to make an offer which would involve him in a liability of 1500*l.* direct to the vendor, and he had to rely upon the assistance which was to be given by the two plaintiffs through Harmer, with whom he was dealing ; and the upshot of it all was that in the proportions I have already mentioned the money was available and Armstrong was with that assurance able to make the offer which he did, and which was accepted. The result was that there was an agreement in writing and under seal, made on December 15, 1932, between the Company and the others to sell to the defendant Armstrong, who agreed to purchase, the copyright and interest and all the goodwill of the Company in the five periodicals mentioned. When that had been done Armstrong asserted that he alone was interested in this purchase, and he purported shortly afterwards to come to an arrangement with the Company under which he put an end to the purchase agreement.

The action is brought, as I have said, for a declaration that Armstrong was not acting on his own account in the negotiations and in the conclusion of the agreement, but the plaintiffs were also interested with him ; and then for specific performance. Maugham J. has definitely found that Armstrong was acting in the capacity of an agent and in a fiduciary capacity towards the plaintiffs. The order that was made is this : " The Court doth declare that the defendant Armstrong entered into and holds the benefit of the agreement of December 15, 1932, as agent and trustee for the plaintiffs and himself in the following shares." From that finding there was a cross-appeal by Armstrong which raised

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the question whether or not Armstrong was acting in a fiduciary capacity in relation to that agreement. We have heard Mr. Cleveland-Stevens upon the point and we have come without hesitation to the same conclusion that the learned judge reached. I have referred to some of the evidence and it appears to me that the behaviour of Armstrong, the fact that he was equipped to make an offer only through the assistance of the plaintiffs, abundantly justifies and confirms the conclusion reached by the learned judge that Armstrong in the whole of this matter was acting as agent and in a fiduciary position for the plaintiffs.

That being so, we dismiss the cross-appeal. Then comes the question of what ought to be done in the action. The learned judge, finding matters so far in favour of the plaintiffs, says this : " My conclusions must be, first, that the defendant Armstrong committed a breach of trust in writing this letter of December 28, 1932, and requesting the Vallancey Trust to release him from his agreement and return his deposit. The consequence of this action on his part was the rescission of the contract on January 5, 1933, and a fresh contract entered into on the following day with the defendant Sumner." I need not refer to that. All the facts are fully stated in Maugham J.'s judgment. He then holds : " The plaintiffs, in my opinion, are entitled, if they press for it, to have an enquiry to ascertain the amount of damage they have suffered by this breach of trust or agency committed by the defendant Armstrong. On the other hand the plaintiffs are not, in my opinion, entitled to a judgment for specific performance." Why not ? The learned judge found himself pressed by the rule of law, that where a contract under seal is entered into by an agent, even where the agent is described as acting on behalf of the named principal, the principal can neither sue nor be sued upon it—the parties being determined exclusively by the form of the instrument. Sir Herbert Cunliffe, in his argument, called our attention to the statement of the rule made in *Chesterfield, &c., Colliery Co.* v. *Hawkins* (1),

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(1) 3 H. & C. 677.

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where Martin B. quotes a passage from Lord Tenterden's book, "Abbott on Merchant Shipping," p. 170, and where the rule is perhaps as happily stated as it could be in terms of authority. The rule, therefore, is this, that the plaintiffs, not being named and, more, not being indicated—I have put that in especially because of Sir Herbert's argument—are not entitled to bring any proceedings themselves upon this agreement. It is said that this is an agreement made between A and B and on that agreement C and D cannot sue; there is the rule of law and that is the end of it. But is it? There has been a definite finding that Armstrong was a trustee of this agreement for the plaintiffs. He is before the Court. He has, as the learned judge has found, committed a breach of trust in affecting to put an end to the agreement—the Company entering into a new agreement with Sumner—and the plaintiffs are cestuis que trust as beneficiaries upon that contract made by their trustee for them, a contract in which Armstrong himself is beneficially interested.

What ought to be done? I will read these words from the judgment of Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1): "The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant." That undoubtedly is right. The trustee must be before the Court. It was on that ground that the action in *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (2) failed. In the course of his speech in that case Lord Cave said (3): "That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action: Daniell's Chancery Practice, 7th ed., vol. i, p. 172. If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. No doubt the rule does not apply to a mortgagor, at least since the passing of s. 25, sub-s. 5, of the Judicature Act, 1873; and there may be special cases where it will not be enforced, as in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), where the defendant disclaimed any wish to have the legal owners made parties." Then he continues: "Further, under Order XVI., r. 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case." So far we get this; beneficiaries are entitled to have their rights enforced: if the trustee will not enforce them for them the beneficiaries can come before the Court but they must bring before the Court the trustee also. In *Gandy* v. *Gandy* (2), to which I have referred in the course of the argument, the difficulty that arose was overcome by allowing ultimately one of the beneficiaries to sue but making the trustee, who declined to take action, one of the defendants. It will be observed in the course of the argument there that the Court, fully appreciating the difficulties that were placed before it, raised the question of what should be done and adjourned the proceedings in order that the action might be properly constituted. I am quite aware of the criticism—and I think it is a fair one to make—which Sir Herbert Cunliffe advances that in that case there was an indication of the interests of certain beneficiaries, named or not named as the case may be, but quite clearly indicated: that in the present case there is no indication of any trust at all and no indication that there were any beneficiaries and therefore he says that the rule of law, which I have already accepted, must be applied in its strictness. But when one considers that argument one asks the question: Is the Court in such a position that it cannot provide any remedy to the beneficiaries? The answer that may be made is this: Separate proceedings might be taken by the beneficiaries to have it declared that Armstrong was a trustee for them and for himself and that when that had been declared they might obtain leave to sue in his name if he was reluctant to sue. It has already been determined in the present proceedings that Armstrong was a trustee. When that leave to sue in Armstrong's name had been obtained these two plaintiffs in the name of Armstrong would then bring their action against the present defendants, the Company, the vendors, for specific performance. At the present time that involves circuity of action. Is that what the Court at the present time ought to require? Sir Herbert answers: "Yes, because there is the rule of law, and that rule is only modified or relaxed in special circumstances." What the special circumstances may be must depend in each case upon its own facts and if special circumstances are required I am quite prepared to find that they exist in the present case. I should be sorry to think that we put the parties to the expense of separate proceedings to get leave to sue in Armstrong's name when Armstrong himself is now before the Court and has admitted by his counsel that if it is declared that he was a trustee and his cross-appeal fails, then as a trustee he wishes to share in the fruits which he, as one of the beneficiaries, is entitled to receive.

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(1) [1933] A. C. 70, 79.

(2) [1924] A. C. 1.

(3) Ibid. 14.

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(1) [1905] A. C. 454, 462.

(2) 30 Ch. D. 57.

Now I turn to Order XVI., r. 11, and that provides: "No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined . . . be added " and so on. We have actually before us Armstrong declared to be a trustee for himself and the two plaintiffs. There are no absences in the matter of parties. We have the two plaintiffs who are undoubtedly entitled to take some proceedings as beneficiaries and ultimately, if necessary, to sue in Armstrong's name. It would seem almost absurd to send these parties away and to force them to incur greater costs, more circuity of action. Surely, the right course is to deal with the case in the words of Order XVI., r. 11.

For these reasons I have come to the conclusion that, accepting the judgment of the learned judge up to the point at which he found himself compelled to yield to the obstacle of the rule of law, we ought to say that in all the circumstances of the case we are prepared, as all the parties are before the Court, to give the remedy to which they would ultimately become entitled after greater expenditure and greater delay, namely, specific performance of the contract—the contract in which the defendant Armstrong will share together with the plaintiffs.

In those circumstances we shall allow the appeal, discharge the order made as to an enquiry as to damages, declare the rights of the plaintiffs, and make an order for specific performance.

LAWRENCE L.J. In my judgment Maugham J. was plainly right in holding that the defendant Armstrong entered into the contract of December 15, 1932, as a trustee for the plaintiffs and himself. It was strenuously contended on behalf of the defendant Armstrong that because he and the plaintiffs had not finally agreed inter se as to the terms upon which the property comprised in the agreement should be held and dealt with after it had been acquired or the terms upon which the Company was going to take over the property or the terms upon which the defendant Armstrong was to be appointed managing director, the defendant Armstrong was at liberty to treat the agreement to purchase that property as having been made for his sole use and benefit. In my judgment, that contention is not well founded.

The facts have been fully stated by the learned judge and I do not intend to repeat them. I agree with the test applied by the learned judge. After the plaintiffs had agreed with the defendant Armstrong to join with him in acquiring the property and to find a specified proportion of the purchase money and further had authorised him to enter into a contract to purchase the property at a specified price, it is plain that when the defendant Armstrong had entered into the contract accordingly he could have compelled the plaintiffs to contribute their agreed proportions of the purchase money. It is equally plain, in my judgment, that in those circumstances the plaintiffs were entitled to treat the contract as having been entered into by the defendant Armstrong for their benefit as well as his own.

The learned judge has, however, held that although the contract was entered into by the defendant as a trustee for himself and the plaintiffs, yet because it happens that the contract was a contract under seal the plaintiffs cannot enforce it, as they were no parties to it. In my judgment, the view so taken by the learned judge is erroneous. It is well settled and not disputed by the plaintiffs that at common law no one can sue on a contract under seal except the contracting parties. If the contract be one not under seal, besides the actual contracting parties those from whom and between whom consideration proceeds can also sue. The rule is stated plainly by Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1), as follows: " My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam." Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1), after quoting the above extract from Lord Haldane's speech, states: "In that case, as in *Tweddle* v. *Atkinson* (2), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases"—then he cites certain cases as examples—"that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant." The rule that where a party to a contract is trustee for a third party and the trustee refuses to sue the beneficiary can sue, joining the trustee as a party, in my judgment, in no way depends upon whether the contract which the trustee has entered into is under seal or not. Supposing a trustee under a will or settlement were to enter into a contract under seal to purchase a property for the benefit of the trust without disclosing that fact on the face of the contract and that then he were to execute a declaration of trust of his interest under the contract for the benefit of the beneficiaries under the trust instrument, could it for one moment be said that, if the trustee were to refuse to sue on the contract, the beneficiaries were not entitled themselves to sue, joining the trustee as a defendant? It was strenuously contended that in such a case, as the contract was under seal, the beneficiaries' only course was to apply to the Court in the matter of the trust and obtain leave to sue in the name of the trustee. In my opinion there is no foundation for that

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(1) [1915] A. C. 847, 853.

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(1) [1933] A. C. 70, 79.

(2) (1861) 1 B. & S. 393.

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contention. It was admitted that if the contract had been a contract in writing not under seal an action to enforce it could have been brought by the beneficiaries joining the trustee as a defendant. In my judgment, there is no distinction between a contract under seal and a contract not under seal in connection with the equitable rule in question. The contention, in my opinion, confuses two entirely distinct rules, both of which are well established and as to neither of which there can be any reasonable doubt at the present time, namely, the rule that the law does not recognise a jus quaesitum tertio arising by way of contract and the rule that such a right may be conferred by way of property under a trust. Whenever a party under a contract, at the date when he enters into it is (or thereafter constitutes himself) a trustee for a third party that party has a right conferred upon him by way of property to sue on the contract whether the contract be under seal or not and can, according to well settled principles, enforce that right in equity, joining the trustee as a defendant to the action. The right of a beneficiary in such a case as the present, however, is to enforce the agreement according to its tenor, that is to say in favour of the defendant Armstrong, and not in favour of the plaintiff beneficiaries. It was suggested by Sir Herbert Cunliffe that the rule I have stated applies in the case of contracts under seal only where the trust is disclosed on the face of the contract. I know of no such limitation to the rule and, in my judgment, such a limitation cannot be justified in principle. I can conceive that there may be cases in which the Court would hesitate, at the instance of one or more out of a number of beneficiaries, to enforce the performance of a contract made by the trustee with a third party, by reason of the complications which might arise if there were a genuine dispute as to whether it was for the benefit of the trust as a whole to enforce the contract at all. In such a case the Court has the power to decline to enforce the contract until the question whether it is for the benefit of the trust that the contract should be enforced has been determined in an application in the matter of the trust for leave to use the name of the trustee. In the present case, however, there is no such complication. The learned judge, having heard the evidence, has come to the clear conclusion that there was a trust and that the trustee had committed a breach of trust in not enforcing the contract. In these circumstances, I think that the present case is plainly one in which the Court ought to act on the equitable rule and decree specific performance of the contract.

The appeal, in my opinion, ought to be allowed and an order made in the form suggested by the Master of the Rolls.

ROMER L.J. I agree.

Dealing with the cross-appeal, which logically comes first, I am of opinion that the learned judge was plainly right. The facts are these, that the defendant Armstrong, having discovered that the Vallanceys were contemplating the sale of the papers in which they were interested, approached the plaintiff Harmer with a view to seeing whether Harmer would not join with him in a scheme for acquiring those papers and subsequently carrying them on. Harmer, as we know, subsequently associated his co-plaintiff, King, with him, although the negotiations with Armstrong were carried on by Harmer, or, rather, Cecil Harmer, who was Harmer's son. The learned judge finds that in the course of those negotiations Harmer authorised Armstrong to make a definite offer for the papers. Armstrong—the matter still being negotiated between him and Harmer and no definite agreement having then (or, I think, at any time) been arrived at, how the papers should be carried on after they had been bought from the Vallanceys—interviewed the Vallanceys and obtained an offer. It was an offer, I gather, of 2000*l*. There was a letter written by Harmer to King which I understand was put in evidence by the defendant in this action, Armstrong. In that letter Harmer writing to King says this: "Things have been moving re V."—that means "re Vallancey."—"Mr. Armstrong came along, as you know, with a definite offer of 2000*l*. on certain conditions," which he refers to. "We sent it back with a heartrending tale that 1500*l.* cash down was the utmost possible and to our surprise it came back a couple of hours later with the acceptance." How in the world it can be suggested that, having obtained a contract from the Vallanceys, in that way, Armstrong can say that he is entitled to retain the benefit of it for himself really passes my comprehension. Plainly he obtained the contract as trustee for himself and the plaintiffs, and none the less because the parties had not at that time agreed, and never did agree, as to how precisely the papers were to be carried on after they had been acquired. The contract having been obtained, as Maugham J. has declared, by Armstrong as trustee for himself and the plaintiffs in certain shares, it has not been suggested that when the Vallanceys and Armstrong purported to put an end to that contract the contract was or could have been determined as against the plaintiffs of whose existence and interest the Vallanceys were aware.

Therefore the only question remaining is this: Should the plaintiffs issue a writ against Armstrong claiming a declaration that he was trustee and then asking for an order from the Court that he should as trustee institute proceedings or that they should use his name for the purpose of instituting proceedings for specific performance against the Vallanceys; or are they entitled, in order to save circuity of action and multiplicity of proceedings, to issue a writ against Armstrong and the Vallanceys seeking to establish the trust, and then for specific performance of the contract that the Vallanceys had entered into with Armstrong? There are two principles which have to be borne in mind, principles which belong to two distinct systems of law, or, rather, two systems of law that were distinct at the time that the principles were laid down. The first principle is this, that where a right is held by a trustee for the benefit of certain cestuis que trust the cestuis que trust may, where justice demands it, themselves enforce the right in an action to which the trustee is made a party, and may do so whether it is an express trust or a constructive trust or whether the right to be enforced is a right arising under an instrument under hand or an instrument under seal. To a large extent all that has been admitted by the defendants in this action, although at one time Sir Herbert Cunliffe was not willing to admit that in any case could the right be enforced by a cestui que trust when the right arose under an instrument under seal; but he was compelled to abandon that position when he was confronted with the case of *Gandy* v. *Gandy* (1), in which certain cestuis que trust were held entitled to enforce a right arising under an instrument under seal, making the trustee defendant. In the end he confined himself to saying that in the case of an instrument under seal a cestui que trust could only enforce the right in the way I have mentioned where the cestui que trust was himself a party to the instrument, or where, at any rate, the trust appeared on the face of the instrument.

Now the principle that I have referred to has been enunciated many times. It was enunciated by Lord Cave in the case to which the Master of the Rolls has referred of *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (2). It was enunciated recently by Lord Wright in the case to which both my Lords, I think, have referred, *Vandepitte* v. *Preferred Accident Insurance Corporation of New York.* (3) It is also enunciated in Daniell's Chancery Practice (7th ed., vol. i, p. 173), and I want to refer to the statement of the principle there for a purpose that will appear presently. It is there stated: "The principle that requires a trustee, or other owner of the legal estate, to be brought before the Court in actions relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different person from him who claims the beneficial interest. Thus, where an action is brought for the specific performance of a covenant under seal with one for the benefit of another, the covenantee must be a party to an action by the person for whose benefit the covenant was intended against the covenantor. And so, in an action for the specific performance

(1) 30 Ch. D. 57.
(2) [1924] A. C. 1.
(3) [1933] A. C. 70.

of a covenant for the surrender of a copyhold estate to A, in trust for others, A is a necessary party because the effect of a surrender would be to give him the legal estate, and another action might become necessary against him. Where a covenant is entered into with one person for the benefit of another, so as to place such other person in the position of cestui que trust under the contract, then if the covenantee will not sue, the person beneficially interested may sue in equity."

In that passage there is no such exception from the doctrine as has been contended for by the defendants in this case. But then it was said by Sir Herbert Cunliffe that no case can be found in the books in which a cestui que trust has been held entitled to enforce a right arising under a document under seal unless his interest or the trust appears on the face of the document itself. Even so he is not right because, as I think I intimated to him in the course of the argument, it has been laid down that the cestui que trust of the rights under a patent is entitled to enforce those rights, making his trustee a defendant. That was decided by Warrington J., as he then was, in *E. M. Bowden's Patents Syndicate, Ld.* v. *Herbert Smith & Co.* (1), and is a case which was referred to without disapproval—I think I may say with approval—by Lord Cave in *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (2). In that case the equitable owner of a patent sought to restrain an infringement of the patent not merely by way of interlocutory injunction but at the trial without making the legal owner of the patent a party. Warrington J. said he was not entitled to do so but gave him leave to amend by adding the legal owner. What Warrington J. said was this (3): "Now what is the general rule of the Court with regard to an action brought by an equitable owner of property? The common case with which we are most familiar is an action relating to some debt in respect of which the provisions of the Judicature Act, which allow an assignee to bring an action in his own name without joining the assignor, have not been complied with. In that case, unless I am much mistaken, the well-accepted practice of this Court is that the legal owner of the property in question must be a party to the action, either as plaintiff or defendant. He is the proper person to bring the action. If he does not bring the action, then the course which the plaintiff adopts is that of proving that fact and making him a defendant. But the practice of the Court, as I understand it, is that the legal owner of the property must be before the Court somehow, in order that he may be bound. Applying that to the present case and holding, as I do, that that agreement of December, 1897, is not a legal but an equitable assignment of the patent, the conclusion I come to is that it is necessary in order to enable these parties to maintain this action to have the legal owner of the patent before the Court." It is unnecessary to add that a patent is a document under seal. I should add this so that there may be no misconception, that in such a case the cestui que trust, supposing that the right he is seeking to enforce is a contract, does not enforce the performance of the contract to himself but he enforces the performance of the contract to the trustee. One may also refer, I think, usefully to the cases, to some of which our attention was called, in which the question has been considered as to the circumstances in which—and there are circumstances in which—a residuary legatee may bring an action himself to enforce a right belonging to the testator, making the executor a party; and if that right be not confined to rights arising under a document not under seal, that is to say, if, as I think is the case, the right exists so as to enable a cestui que trust in such circumstances to enforce a right under seal, it is perfectly plain that the residuary legatee will not have been a party to the document, nor will the trust under which he is claiming have been expressed in the document. The trust under which he is claiming arises under the will of the covenantee.

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(1) [1904] 2 Ch. 86.
(2) [1924] A. C. 1, 14.
(3) [1904] 2 Ch. 86, 91.

Before going on to consider the other principle I wish to make one other observation. I entirely agree with what Lawrence L.J. has said, that in certain cases it may be extremely inconvenient and, indeed, inequitable to allow a cestui que trust to enforce his right in this way. The cases to which Lawrence L.J. referred were cases in which there was a dispute between the cestuis que trust as to whether the rights should be enforced or as to the method in which the right should be enforced. Take the case of residuary legatees of an estate, one of the assets of which consists of a contract by the testator to sell a portion of his real estate. It may be a question of dispute between the residuary legatees as to whether that contract should be enforced against the purchaser or whether it would not be wiser to forfeit the deposit and seek damages. That is the sort of question that might arise, and where the residuary legatees are not at one, or where some of the residuary legatees are not at one with the executor as to the course that ought to be pursued, it would be wholly wrong for the residuary legatees, who are in favour of specific performance, to bring an action claiming that relief making the executor and the dissenting residuary legatees parties. For the very first question that would have to be determined in the action as between the residuary legatees themselves would be whether in the circumstances it was wiser to ask for specific performance or to forfeit the deposit. In order to form an opinion upon that question the Court might have to consider the opinion of counsel. Of course, all that could not be discussed in the presence of the other party to the contract. I only say that by way of caution to show that I realise that the principle is not to be extended to every case.

Now I want to refer to the other principle because I cannot help thinking that the argument of the defendants leaves out of sight the fact that the two principles are essentially distinct. The other principle is a principle of the common law and it is this: Where in a document not under seal A contracts with B, A being the agent for C, C can enforce the contract himself, and B, on the other hand, can enforce the contract against C. But be it observed in that case that when C enforces the contract he does not enforce it in the name of A, his agent; he enforces it as against B in his own interest and the contract is performed by B to C. If the document be under seal that rule does not apply at all, and if it be under seal C cannot sue B, nor can B sue C. But that has nothing to do with this principle in equity, which is not dealing with the circumstances in which a third party, a person who is not a party to the contract, can enforce it for his own benefit. As I pointed out just now, under the principle of equity the contract is always enforced in the name of and for the benefit of the trustee. In the present case no one is suggesting that the contract should be performed in the name of any one other than the trustee Armstrong. Let me now refer again to that statement of the equitable principle, that is to be found in Daniell's Chancery Practice. (1) After stating the principle in the terms in which I have read it goes on as follows (2): "The preceding cases arose upon covenants formally entered into under seal; the same rule does not, however, apply to less formal instruments, such as ordinary agreements not under seal, where one party contracts as agent for the benefit of another. In such cases, it is not necessary to bring the agent before the Court; because the principal is entitled to interpose and supersede the right of his agent, by claiming to have the contract performed to himself, although made in the name of his agent." In other words, so far from stating that the principle does not apply to a contract under seal, it points out that it does not apply in some cases to a contract not under seal, for this reason, that in such cases it is not always necessary to bring the trustee or the agent before the Court. In my opinion, the two statements that I have read from Daniell's Chancery Practice are proper and correct statements of the law. In the present case, as has been pointed out, Armstrong, although one of the cestuis que trust under the trust which has been declared to exist, is willing, if he cannot retain the contract for his sole benefit, that it should be specifically performed for the benefit of himself and the other cestuis que

(1) 8th ed., vol. i, p. 152.

(2) Ibid., pp. 152, 153.

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trust. There is therefore no difficulty in the present case in allowing the two cestuis que trust, Harmer and King, in proceedings constituted as these proceedings have been constituted, to get an order for specific performance.

I will only add this. In one of the cases relating to residuary legatees (*Yeatman* v. *Yeatman* (1)) Hall V.C. said: "My impression rather is that it would be a correct holding to say that if the circumstances of any given case are such that upon an inquiry directed as to whether any and what proceedings should be taken, the Court upon the materials before it would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name." It seems to me that in an inquiry—here no inquiry is necessary because, as I say, Armstrong wishes specific performance of the contract in the circumstances—it would be perfectly obvious that directions would be given to the trustee to enforce this contract and, that being so, it can be done in these proceedings.

For these reasons I agree with the order which has been proposed by the Master of the Rolls.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *H. Leonard Hunter; Osborn, Jenkyn & Son.*

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(1) 7 Ch. D. 210, 216.

W. I. C.

Applied. *Re* Haynes' Will Trusts.
[1948] 2 All E.R. 423.

In re GILLOTT'S SETTLEMENT.

ollowed. *Re* Haynes.
[1949] 1 Ch. 5

CHATTOCK *v.* REID.

MAUGHAM
J.

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May 17.

[1933. G. 72.]

Settlement—Power to appoint interest to husband—Forfeiture on alienation—Covenant by husband and wife to pay income in discharge of debts—Appointment of interest by Will—Forfeiture.

A marriage settlement provided that the wife, if she survived the husband, might appoint all or part of the income of the settled property to be paid to any subsequent husband who might survive her, until he should (inter alia) assign it. A second settlement comprised property subject to like trusts, and a third gave the wife power to appoint to any subsequent husband with or without restriction. An agreement between the wife's second husband, the wife, and a lender, for a loan to be applied by the second husband and the wife in paying certain debts, provided that, while money was owing under the agreement, the second husband and the wife should, within three days after receiving any income of the settled property, pay half of it into a specified account, that the money so paid should be used in paying the debts and repaying the loan, and that what remained should be handed to the second husband and the wife or the survivor as they should direct. A later agreement provided that the second husband and the wife, so long as any money then owing by them remained owing, would pay income into a specified account within three days after receiving it, and that when so paid it should be held in trust for payments to other parties to the agreement as well as to the second husband and the wife. The wife died, having by her will appointed, within the terms of the first settlement, an interest to the second husband in the income of the property comprised in the three settlements, until he should (inter alia) assign it.

Held, (1.) that the covenants in the agreements for payment into specified accounts effected an equitable assignment of the income;

(2.) that after the wife's death the second husband became a trustee of the income, as soon as he received it, for those intended to benefit under the agreements, although he was not obliged to pay it over immediately;

(3.) that, although no assignment was intended, the second husband, on the true construction of the agreements, had forfeited his interest.

In re Lind [1915] 2 Ch. 345 followed.

Palmer v. *Carey* [1926] A. C. 703 distinguished.

Adjourned Summons.

By a marriage settlement dated August 15, 1892, and made between Joseph Gillott (hereinafter called the settlor) of the first part, Thomas William Reid (hereinafter called the first husband) of the second part, Ethel Leonora Gillott (hereinafter called the wife) of the third part and Algernon Sydney Gillott and Sydney Mitchell as trustees of the fourth part and hereinafter called the first settlement it was provided (inter alia) as follows: " . . . The . . . trustees . . . shall pay the annual produce of the trust premises to the said Ethel Leonora Gillott during her life for her sole and separate use . . . From and after the death of the said Ethel Leonora Gillott if the said Thomas William Reid survive the said Ethel Leonora Gillott and shall not be outlawed or have been or become a bankrupt and shall not have assigned charged or incumbered or attempted or affected to assign charge or incumber the annual produce of the trust premises or any part thereof or have done or suffered anything whereby the same or any part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become vested in or payable to some other person or persons the said trustees . . . shall pay the same annual produce to the said Thomas William Reid until (which shall first happen) he shall die or marry again or be outlawed or become a bankrupt or assign, charge or incumber the said annual produce or some part thereof or do or suffer something whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise if belonging to him become vested in or payable to some other person or persons . . . " There followed trusts, subject to the interests of the wife and the first husband, in favour of the issue of the intended marriage not material to this report, and the settlement then provided (inter alia) " . . . If the said Ethel Leonora Gillott survive the said Thomas William Reid it shall be lawful for the said Ethel Leonora Gillott at any time or times after the death of the said Thomas William Reid if sole by any deed or . . . writing . . . sealed and delivered with or without power of revocation and new appointment or whether covert or sole by will or codicil to appoint that the whole or any part of the annual produce of the trust premises hereby settled shall be paid after the death of the said Ethel Leonora Gillott to any husband whom she may marry after the death of the said Thomas William Reid and who may survive her on the like terms and terminable in the like events and subject in all respects to the same restrictions and conditions as are hereunder applicable to the trusts hereinbefore declared in favor (*sic*) of the said Thomas William Reid in case he survives the said Ethel Leonora Gillott . . ." The provision then gave the wife power while sole to appoint by the same or any other deed or writing or whether covert or sole by will or codicil to appoint as therein mentioned in favour of her issue by any husband whom she might marry after the first husband's death. By a settlement dated January 2, 1895, and made between the same parties and in the same order as the first settlement except that the wife was therein described by her then name of Ethel Leonora Reid and hereinafter called the second settlement the funds therein comprised were settled upon the trusts of, and as an addition to the funds originally settled by, the first settlement. By his will dated December 17, 1900, the settlor bequeathed a sum of money to the trustees of the first settlement to be held by them upon the same trusts as the funds thereby settled. By a settlement dated December 3, 1902, and made between the first husband of the first part the wife of the second part and Algernon Sydney Gillott and Sydney Mitchell as trustees of the third part and hereinafter called the third settlement, the wife's shares, original and accruing, in her paternal grandfather's estate and a sum mentioned in the third settlement were settled upon trusts which were substantially the same as those declared by the first and second settlements except that the power conferred by the third settlement upon the wife in the event of her surviving the first husband of appointing an interest in favour of any husband whom she might marry after the first husband's death was a power to appoint with or without restriction. There were four children by the marriage of the wife and the first husband, all of whom were defendants to this summons. The first husband died on August 28, 1904, and on November 21, 1906, the wife married James Marjoribanks Campbell, a defendant to this summons, hereinafter called the second husband. Of that marriage there was one child who was of age at the date of, and was a defendant to, this summons. An agreement dated November 18, 1908, and made between the second husband of the first part, the wife of the second part and Sarah Male, hereinafter called the lender, of the third part and hereinafter called the agreement of 1908, recited that the second husband and the wife were jointly and severally indebted to the National Bank of Scotland, Limited, the British Linen Bank, Limited, and persons whose names appeared in a schedule to the document; that the second husband had no capital moneys or other property save some furniture and effects and a stipend from a benefice; that the wife had no capital moneys or other property save some furniture and effects and an income of about 1400*l.* a year during her life payable under the first, second and third settlements and subject to restraints against anticipation; that she had power to appoint an interest to the second husband, should he survive her, in accordance with the terms of the first and third settlements, the effects of which were stated in the recital; that the second husband and the wife wished to borrow 3016*l.* 7*s.* 0*d.* to enable them to pay their debts to that amount and could not give as a matter of business adequate security; and that the lender, out of friendship to the wife and gratitude to her father, had agreed to lend that sum. The provisions which followed included a covenant by the second husband and the wife for repayment, a provision that they should apply the 3016*l.* 7*s.* 0*d.* in paying to such of the persons mentioned in the first schedule as they should decide, the whole of their scheduled debts or such part of them as they should think proper, and provisions that certain policies of assurance should be redeemed, a new policy be effected, and three policies be assigned by the second husband and the wife, or the banks which had been mentioned, to the lender by way of mortgage. Clause 10 provided: "The wife in exercise of the power in that behalf conferred on her by the said indentures of settlement respectively will forthwith by will appoint that from and after her decease the income of the funds comprised in or subject to the trusts of the said settlements respectively shall be paid to the husband for the term of his natural life and will not so long as any principal money remains owing under the foregoing covenant revoke or vary any such appointment." Clause 11 provided: "As long as any money shall remain owing under these presents each of them the husband and the wife shall within three days after the receipt of any money in the nature of income pay one equal half part of such money into an account to be opened in the name of Sydney Mitchell . . . at the branch of the Bank" (*sic*). Clause 12 provided: "The said Sydney Mitchell (hereinafter called the depositee) shall hold all moneys paid into the said account subject to the following directions: (*a*) Until all the scheduled debts are fully paid the depositee shall . . . pay the said moneys or so much thereof as shall be sufficient to pay in full the then unpaid balance of the scheduled debts to the husband and the wife jointly and the husband and wife shall forthwith apply the same in or towards payment of such unpaid balance and not otherwise and shall within 7 days after receipt of such moneys account in writing for the same to the depositee and verify such account in the like manner (mutatis mutandis) as is provided by Clause 6 hereof." (Clause 6 provided that within 30 days from the date of the agreement of 1908 the husband and wife should give the lender a true account in writing verified by receipts or vouchers and if required by a statutory declaration of the husband and wife showing how the sum of 3016*l.* 7*s.* 0*d.* and every part thereof had been paid or applied.) "(*b*) After the said scheduled debts are fully paid the depositee shall at his discretion either deposit the said moneys with a banker at interest or invest the same in the purchase of any of the securities mentioned in the second schedule hereto . . . and the said moneys and investments and the income thereof respectively shall stand charged with the payment of all moneys due to the lender under these

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presents. (*c*) When all . . . moneys due under these presents shall have been fully paid and satisfied the depositee shall hand over and transfer all moneys and securities in his hands under the last hereinbefore written sub-clause to the husband and the wife or the survivor of them or as they or he or she shall direct . . . (*e*) " The directions contained in the foregoing sub-clauses may be revoked or varied at any time by writing under the hands of the husband and the wife or the survivor of them and the lender and the depositee for the time being of the said moneys." An agreement executed in 1927 by the second husband of the first part, the wife of the second part, the lender of the third part, a depositee of the fourth part, and other parties who were together advancing a further amount, and hereinafter called the agreement of 1927, referred to the agreement of 1908 and other agreements specified in Schedule A to the agreement of 1927, whereunder the second husband and the wife were indebted to certain parties in certain sums, recited the agreement of those parties to modify the principal documents as therein mentioned, and stated that each of the parties to the agreement of 1927 ratified and approved a number of specified payments by the depositee Sydney Mitchell and by his executors and discharged him and them from further liability. The agreement of 1927 then provided as follows : " (Third) So long as any money now owing by the husband and wife as aforesaid shall remain owing, the husband and wife shall within three days after the receipt of any money in the nature of income pay the whole of such income into an account to be opened in the name of the said . . . depositee at the Dumfries Branch of the British Linen Bank or at such other Bank as shall be determined by the parties third to eighth hereto, and no personal responsibility shall be upon the depositee to enforce this clause. (Fourth) The depositee shall hold all the money so paid into the said account in trust for the following purposes, to be carried out so far as such monies (*sic*) will permit in the following order, namely :—(*a*) To pay the costs and expenses arising out of or incidental to these presents and to the principal documents so far as the same are still unfulfilled. (*b*) To pay the premiums required for keeping in force the following policies: . . ." There followed details of the policies and directions for payment to the lender of interest at 5 per cent. per annum on sums owing to her, for payment of certain sums to the second husband and the wife jointly on the first day of each month free from deduction for income tax, for payment of certain taxes and of interest half-yearly at the rate of 5 per cent. to the parties other than the lender, for a further payment to the lender, and for payment of the ultimate surplus received by the second husband and the wife after performing those directions as to three equal fifth parts to the lender and as to the remainder to the other parties to the agreement of 1927 rateably and proportionately to the respective sums owing to them until those sums with the interest on them should be fully paid off, as the same were more fully set forth in an agreement executed in 1925. The agreement of 1927 declared that the principal documents were modified and altered so far as was necessary to give effect to that agreement, and that that agreement, and the rights and obligations of the parties under it, should be construed in accordance with the law of England. By her will dated September 3, 1929, the wife, after reciting that she had power to appoint in favour of any husband whom she might marry the income of the fund settled by the first, second and third settlements, provided as follows: Clause 7. " . . . I hereby . . . appoint that the trustees of the same settlements shall after my death stand possessed of the trust funds . . . upon the trusts following . . ." Clause 8. "In case the said James Marjoribanks Campbell shall survive me and shall not have been outlawed or have been or become a bankrupt and shall not have assigned charged or encumbered or attempted to assign charge or encumber the annual produce of the trust premises or any part thereof or have done or suffered anything whereby the same or any part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to himself become vested in or payable to some other person or persons then the trustees . . . shall

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pay the annual produce of the property thereby respectively settled to the said James Marjoribanks Campbell until he shall die or marry again or be outlawed or become bankrupt or assign charge or encumber the said annual produce or some part thereof or do or suffer something whereby the same or some part thereof would by his act or default or by some operation of law or otherwise if belonging absolutely to himself become payable to some other person or persons." The wife died on June 21, 1932, and by this summons which was taken out on January 10, 1933, and amended on April 5, 1933, the trustees of the first, second and third settlements asked (inter alia) whether the appointment which she had purported to make by will was not invalid, but took effect so far as it conformed with the terms of the power of appointment vested in her, and whether upon the true construction of the settlements and of the appointment made by the wife's will in favour of the second husband, and by virtue of the agreements of 1908 and 1927 and thirteen other instruments executed by the second husband between those dates, the interest so appointed to the second husband failed to take effect.

R. H. Hodge for the trustees.

R. F. Roxburgh K.C. and *J. H. Boraston* for a child of the wife and the first husband. By reason of his having executed the agreements of 1908 and 1927 and the other instruments the second husband has forfeited the interest which otherwise could have come to him by virtue of the appointment. It cannot be contended that he has not assigned or attempted to assign the annual produce of the trust premises. The authorities were considered by Swinfen Eady L.J. in *In re Lind* (1), where he said : " It is clear . . . . that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action." In *Oldham* v. *Oldham* (2),

(1) [1915] 2 Ch. 345, 360. (2) (1866–7) L. R. 3 Eq. 404.

it was held that a written authority to trustees of an annuity, which was subject to forfeiture on its being charged or assigned, to pay it in reduction of a debt, occasioned the forfeiture. In *In re Spearman* (1), it was held that a husband's covenant in a separation deed to allow the wife to receive the interest, dividends and income of the property which he had brought into the marriage settlement and which, under that settlement, he was to forfeit upon alienation, operated as an equitable assignment of his life interest, which he therefore forfeited. In *Wilkinson* v. *Wilkinson* (2), it was held that an agreement to charge a debt on a certain estate should another estate be insufficient to pay it, a power of attorney to receive rent and payment in discharge of debts, and authority to receive future rents, each created a forfeiture under a proviso for forfeiture. In the present case there has been an equitable assignment for value of the annual produce of the trust premises, i.e., of something which the Court is able to identify, and accordingly there has been a forfeiture.

H. S. G. Buckmaster for grandchildren of the wife and the first husband adopted the last argument.

F. R. Evershed K.C. and *A. Andrewes Uthwatt* for the second husband. The second husband did not incur a forfeiture by executing the agreements of 1908 and 1927 and the other instruments. He contracted thereby to pay into the depositees' account money in the nature of income "within three days" of receiving it. During those three days that money is his own absolute property and as soon as he receives it it ceases to be annual produce of the trust premises. It is that money, when received, that the second husband contracted to pay into the depositees' account. It is open to the Court to hold that no equitable assignment was intended: see *Samuel* v. *Samuel.* (3) In *Tailby* v. *Official Receiver* (4), Lord Macnaghten said: "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear." In the present case an

(1) (1900) 82 L. T. 302.
(2) (1819) 3 Swanst. 515.
(3) (1879) 12 Ch. D. 152.
(4) (1888) 13 App. Cas. 523, 543.

assignment was neither intended nor effected. Even if one had been effected, it would not have caused a forfeiture, for it would not have been (as it would have to be to have that effect), an assignment of an interest in funds in the hands of trustees. As the money in the nature of income, when received by the husband, becomes his absolute property, the obligation to pay it into the depositees' account is purely a contractual obligation. It was not desired that it should be anything else, and it cannot be contended that the annual produce of the trust premises has been assigned.

W. E. Vernon for the other children of the wife and the first husband and the child of the wife and the second husband.

J. Neville Gray for a mortgagee of the interests of three of the children of the wife and the first husband.

MAUGHAM J. [His Lordship stated the circumstances under which the first settlement, the second settlement, and the agreement of 1908 were executed and the effect of those documents, and continued :]

The main question that arises with regard to the agreement of 1908 is whether the provision in clause 11 does not amount in the circumstances to an equitable assignment of one half of the income payable to the wife or the second husband under the settlements the effect of which I have stated. It has been suggested as a preliminary point that, inasmuch as the clause refers to a payment of one equal half part of any money received in the nature of income, there is no definite description of the property or the moneys which have to be handed over, and, accordingly, there are no words sufficient to establish an assignment. I do not take that view. I think, having regard to the elaborate nature of the recitals and the specific statements as to the property of both the second husband and the wife, and in particular the statement that the income of the wife is 1400*l.* a year under the three settlements, it is reasonably clear that clause 11 means that immediately the second husband or the wife receives the income of those settlements he or she is bound to pay over one equal half part of that income to an account to be opened in the name of the depositee.

[His Lordship then stated the effect of the agreement of 1927 and continued :]

Can it be said that notwithstanding the execution of those agreements the interest on the investments standing upon the trusts of the settlements could be paid to the second husband after the death of the wife on the ground that he had not assigned, or attempted or affected to assign, the annual produce of the trust premises or any part thereof, nor done or suffered anything whereby the same or any part thereof would through his act have become vested in or payable to some other person ? The point is taken by counsel for the second husband that the covenant is so framed as to relate to property which has already become the absolute interest of the second husband inasmuch as the covenant refers only to money which has to be paid over into the name of Sydney Mitchell within three days after the money has been received by the second husband. It is true that under clause 11, and it is also true that under the third clause of the agreement of 1927, the covenant relates to moneys which have been paid to the husband, and does not operate until they have reached his hands. The suggestion then is that the property has become his absolute interest and accordingly that clause 11 and the equivalent clause in the subsequent agreement operate only as matters of contract and that it is impossible to say that the property in question has become in law or in equity the property of the third persons.

A number of cases have been cited to me, but I do not think I need go beyond a citation of two or three of them. The first one to which I should like to refer is *In re Lind* (1), a decision of the Court of Appeal, where Swinfen Eady L.J. delivered an elaborate reserved judgment in which most of the previous authorities were reviewed. Accordingly I think it is unnecessary for me to deal with those previous authorities. The question there related to the assignment by one Hugh Lind

(1) [1915] 2 Ch. 345

in favour of the Norwich Union Life Insurance Society of a spes successionis to arise on his mother's death as next of kin to his mother who was alive at the date of the assignment. Subsequently to the assignment he was adjudicated a bankrupt and two years later he received his discharge. His mother then died and the share fell into possession. It will be observed that the neat point arose whether the assignment by Hugh Lind of something non-existent as property, intended primarily to have effect only by virtue of a covenant or agreement operative after the property came into existence, was one which rested only in contract so that his discharge in bankruptcy put an end to his obligation to perform the contract, or whether the assignment operated in equity as from the moment of the death of his mother to transfer what was previously only a spes successionis so that, notwithstanding his discharge in bankruptcy, the Norwich Union Life Insurance Society was entitled to the property. That question involved an elaborate consideration of the doctrines of equity with regard to equitable assignments, and the well-known cases of *Metcalfe* v. *Archbishop of York* (1), *Holroyd* v. *Marshall* (2), *Tailby* v. *Official Receiver* (3), and a number of other cases were discussed. Swinfen Eady L.J. stated the conclusion at which he had arrived in the following words: (4) "It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action." Now come these words: "The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for." Phillimore and Bankes L.JJ. agreed. I accept that as being a true and accurate statement of the law and I think it binds me to hold that such a covenant as I find in clause 11 of the agreement of 1908, being a covenant for value, had this effect, that the second husband, after the death of the wife, upon receipt of any income paid to him by the trustees of the settlements, became a trustee of one half part of such income for the persons intended to derive benefit under the agreement. The event had happened, the money had been handed to him, and having received the consideration, he became in equity (apart from the question of forfeiture) a trustee for the depositee and the persons who were cestuis que trust under the directions as to how the depositee was to apply the fund. In my opinion it makes no difference that the obligation to pay over the one half of the money was an obligation to do it within three days after the receipt of the money. I think the position would be exactly the same if the word " forthwith " had been used. On the day on which the second husband received a cheque for a particular sum as part of the income in question he had not got free dominion over it : he became a trustee of it and accordingly I do not accept the view that before the so-called equitable assignment attached the property must necessarily have become the absolute interest of the husband. So to hold would be contrary to the decision in *In re Lind* (1) and contrary, in my opinion, to the doctrines which the Court of Equity has been accustomed to act upon ever since the decision in *Metcalfe* v. *Archbishop of York* (2) namely, for nearly 100 years. Counsel for the husband relied upon a decision of the Privy Council in *Palmer* v. *Carey* (3). I confess at first sight it looked as if some ground was to be found in that decision in support of his view, but a reference to the report of the case in the High Court of Australia (4) clears up the slight obscurity as to the facts which might arise on the report in the Law Reports. What had happened was that the lender, who was one Carey, had undoubtedly entered into an agreement of April 30, 1917, with one Johnstone, the effect of which is stated in the report in the Law Reports (5). Pursuant to that

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(1) (1833) 6 Sim. 224; (1836) 1 Myl. & Cr. 547.

(2) (1861–2) 10 H. L. C. 191.

(3) 13 App. Cas. 523.

(4) [1915] 2 Ch. 345, 360.

(1) [1915] 2 Ch. 345.

(2) 6 Sim. 224 ; 1 Myl. & Cr. 547.

(3) [1926] A. C. 703.

(4) (1933) 34 C. L. R. 380.

(5) [1926] A. C. 703, 705.

agreement large sums were advanced by Carey to Johnstone and the advances so made exceeded 10,000*l.* Johnstone, being in pecuniary difficulties, on May 31 entered into an agreement in writing by which, in consideration of the release of the sum of 18,990*l.* Johnstone assigned to Carey all the stock-in-trade and fittings of his premises together with the goods then in bond, and, in consideration of the sale and delivery of that stock-in-trade and fixtures, by a subsequent agreement of June 7, 1921, Carey released Johnstone from all liability under the agreement of April 30, 1917, and also all claims by him for share of profits of the business to date pursuant to that agreement. Three weeks afterwards Johnstone sequestrated the estate and Palmer, the appellant in the Privy Council case, was appointed as official assignee. Upon the motion of the official assignee an order was made in Australia declaring void as against the official assignee the sale, handing over, delivery and transfer by Johnstone to Carey of the lease, fixtures, stock-in-trade and book debts and other assets of Johnstone of or in connection with his business. It was then necessary to determine whether Carey was entitled to any security, lien or charge under clause 3 of the agreement of April 30, 1917, and if so for what amount. There was, however, at the date of the bankruptcy no sum standing to the credit of Carey in the account which was provided for in the agreement of April 30, 1917; on the contrary, that account was very largely in debit, and the question was whether Carey could claim, notwithstanding the subsequent transaction of June 7, 1921, that he had an equitable charge over the goods the subject matter of the later agreement, or over their proceeds of sale in the hands of the assignee in bankruptcy. With that explanation I think it becomes easy to understand what the Privy Council had to decide and decided, but in my opinion the case throws no doubt on the correctness of the decision of the Court of Appeal in *In re Lind* (1) or on any other of the authorities which have been cited before me.

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(1) [1915] 2 Ch. 345.

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A further point remains to be determined. There is some ground for the view that, ordinarily speaking at any rate, a document ought not to operate as an equitable assignment unless the parties mean it to be such. It is said that in this case it is clear that the second husband and the wife and their advisers were doing their best to avoid any equitable assignment or any other document which would have the effect of causing a forfeiture of the second husband's interest. The wife's interest of course could not be forfeited because she was restrained from anticipation, but the second husband's interest was in jeopardy if any event should happen which, but for the form of the clause, would result in the income after the wife's death being payable to anybody other than himself. It is not however in my view open to the Court to construe clause 11 (and the similar clause in the later document) as one which, not being intended to have any effect other than a contractual effect, does not cause a forfeiture: see *In re Spearman.* (1) The language used is consistent only with the view that when the second husband receives the income he becomes a trustee of the income and is bound to hand over the whole of it under the agreement of 1927 to the depositee, and I am unable to hold that upon the true construction of the language that does not follow. I would add that I cannot believe that the parties intended to leave it simply to the good faith of the second husband to hand over the income or not as he thought fit. If that had been the true view and the true intention of the parties, the whole of clause 11 in the agreement of 1908 and of the equivalent clause in the agreement of 1927 should have been omitted and the parties should have relied simply upon a verbal assurance or perhaps an informal statement of the second husband's intention. I have the obligation recorded here in several carefully drawn up documents, that, so long as any money remains owing to the persons in question, each of them, the second husband and the wife, shall within three days after the receipt of any money in the nature of income pay a proportion or the whole, as the case may be, into the name of

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(1) 82 L. T. 302.

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the depositee. Accordingly, supposing that were not done, apart from the question of forfeiture, the parties could have obtained an injunction.

On the whole, therefore, I must come to the conclusion that the second husband's interest has been forfeited by the events which have happened.

Solicitors: *Bird and Bird, for Sydney Mitchell, Chattock & Hatton, Birmingham; Vizard, Oldham, Crowder & Cash, for Oldham & Marsh, Melton Mowbray; Lawrence, Graham & Co.*

K. R. A. H.

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In re MEWBURN'S SETTLEMENT.

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[1933. M. 225.]

Settlement before 1926—*Power of Appointment—Trusts for children or issue of donee as he "shall by will or codicil appoint"—Will executed before* 1926 *—Appointment in favour of children and issue—Power of Advancement and Maintenance, in will, to trustees of settlement—No Delegation.*

A settlement executed before 1926 declared trusts in favour of the children or remoter issue of the donee of a power of appointment under the settlement "with such gifts over and generally in such manner for the benefit of such issue" as the donee should by will or codicil appoint, but so that under any appointment a child should not take a vested interest unless being a son he attained the age of twenty-one years or being a daughter she attained that age or married. By his will, also executed before 1926, the donee exercised the power, in accordance with its terms, in favour of his sons, daughters, and remoter issue, and further declared and appointed that the trustees for the time being of the settlement might at any time, but, with regard to any estate, funds or moneys in which any person or persons might have a prior life or other interest, with the written consent of that person or those persons while having that interest, raise up to one-half of the then expectant, presumptive or vested share of any grandchild or remoter issue of his under the appointments made by the will and pay or apply the amounts raised for their benefit as the trustees should think fit.

Held, that the power of appointment was validly exercised by the will, and that the trustees could properly exercise the power of advancement.

In re Greenslade [1915] 1 Ch. 155 and *In re Joicey* [1915] 2 Ch. 115 considered and distinguished.

ADJOURNED SUMMONS.

By this summons the trustees of a settlement executed before 1926 asked whether they could properly exercise a power of advancement given to them by the will, also executed before 1926, of the donee, under the settlement, of a power of appointment by will or codicil for the benefit of the donee's children or remoter issue.

By the settlement, which was dated May 2, 1894, and made between William Mewburn the elder of the one part and William Mewburn the younger and three others of the other part, certain securities, therein called "the trust fund," were settled upon trust to pay the annual income thereof to William Mewburn the younger during his life or until forfeiture as therein mentioned and, if the trusts should fail or determine during his life, upon trust to pay it for the purposes therein mentioned during the remainder of his life. The settlement further provided : " . . . subject to the trusts and provisions herein before (sic) contained the trust fund and the income thereof shall be held in trust for all such one or more exclusively of the other or others of the issue of the said William Mewburn the younger whether children or remoter issue at such time and if more than one in such shares and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as the said William Mewburn the younger shall by will or codicil appoint, but so that under any appointment a child shall not take a vested interest unless being a son he attains the age of twenty-one years or being a daughter she attains that age or marries, and in default of and until and subject to any such appointment in trust for all or any the children or child of the said William Mewburn the younger, who being sons or a son attain the age of twenty-one years or being daughters or a daughter attain that age or marry under it, and if more than one in equal shares." By clause 1 of his will, dated December 10, 1902, William Mewburn the younger, having recited the power of appointment after reciting another power of appointment, not material to this report, given to him by the will of William Mewburn the elder, provided as follows: " . . . . I hereby appoint that the . . . . trustees or trustee for the time being of the said . . . . indenture" (i.e., the settlement) "shall from and after my decease . . . . stand possessed of the capital and income of so much of the said . . . . trust fund . . . . as I have power to appoint in trust for all or any my children or child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry and if more than one in equal shares . . . ." Clause 2 of the will provided as follows: " . . . . I further declare and appoint that notwithstanding the appointment hereinbefore made the shares . . . . of the . . . . said trust fund which are . . . . hereinbefore expressed to be appointed to each daughter of mine who shall attain the age of twenty-one years or marry shall not in the case of any of my said daughters now living vest absolutely in such daughter but shall be retained by the trustees or trustee for the time being of the said . . . . indenture . . . . and held by them or him upon trust during the life of such daughter to pay the income of her . . . . share to her for her separate use (without power of anticipation). And after the death of such daughter the trustees or trustee for the time being of the said . . . . indenture shall hold such . . . . share and the future income thereof upon trust for such person or persons for such purposes and in such manner as such daughter shall, whether covert or sole by will or any codicil thereto appoint and in default of and subject to every such appointment as to the capital and income of such . . . . share of the said trust estate in trust for all such of the children of such daughter of mine as shall be living at my decease, and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares . . . ." Clause 9 of the will provided as follows: "Provided always and I declare and so far as I lawfully can I further appoint that the trustees or trustee for the time being of . . . . the hereinbefore recited indenture as to the trust fund hereinbefore appointed . . . . may at any time or times but so that in regard to any estate funds or moneys in which any person or persons may have a prior life or other interest, the exercise of this present power be with their, his or her consent in writing whilst having such interest whether contingent or not raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any grandchild or remoter issue of mine under the appointments made by . . . . this my will and pay or apply the same for the advancement or benefit of such person in such manner as the person or persons exercising this power shall think fit . . . ." William Mewburn the younger died on May 14, 1932, having had six children, all of whom were born before the date of the settlement, and all of whom were defendants to this summons, which was taken out by the trustees of the settlement for the decision (inter alia) of the question whether, upon the true construction of the settlement and in the events which had happened, the trustees for the time being of the settlement had power to advance any and, if so, what part of the share in the trust funds subject to the trusts of the settlement to which the infant defendants to the summons (grandchildren of William Mewburn the younger) were entitled, with the consent of the tenant for life of the share, for the benefit of those infant defendants.

J. V. Nesbitt for the plaintiffs, referred to *In re Greenslade* (1), *In re Joicey* (2), and Prideaux's Forms and Precedents in Conveyancing, 22nd ed., vol. 3, p. 134, 15th ed., vol. 2, p. 293.

R. M. Pattisson for children and grandchildren of William Mewburn the younger, referred to *In re Greenslade* (1), *In re Joicey* (2), and *In re May's Settlement.* (3)

Maugham J. This summons raises an interesting point on which different minds might come to different conclusions.

(1) [1915] 1 Ch. 155.
(2) [1915] 2 Ch. 115.
(3) [1926] Ch. 136.

years it was to take absolutely, "provided always that the said trustees" (of the testator's will) "shall (if and so far as I can authorize the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely." That is in substance the statement of facts as given in the headnote. The will was of a peculiar character, and the question before the Court was not as to the propriety of the daughter's giving powers of management and advancement to the trustees, but was whether the proviso was valid, and it had to be admitted that the delegated power, if exercised, would have the effect of turning the contingent interest of the son in whose favour it was exercised into an absolute interest and destroying the interest to which younger children might in certain events become entitled. The Court of Appeal pointed out that that was beyond an ordinary power of advancement, though it is only fair to say that they intimated that strong arguments might be put forward in favour of an ordinary power. In *In re May's Settlement* (1), Astbury J. had before him a simpler case than I have before me. It was a case (again I am reading substantially from the headnote) in which a widow with a special power of appointing a settled fund (subject to her own life interest) to her issue "in such manner and form in every respect" as she should by deed or will appoint, irrevocably appointed the fund by deed to her two infant children (naming them) in equal shares as tenants in common and gave the trustees (of the settlement) an ordinary power of advancement. It was clear that the children took absolute interests and the only question was whether the widow's exercise of the power, in so far as it purported to give to the trustees of the settlement a power of advancement, was valid or not. The learned judge had no difficulty in distinguishing *In re Greenslade* (2)

(1) [1926] Ch. 136.

(2) [1915] 1 Ch. 155.

and in holding that in the case before him the appointment was not invalid as being a delegation but was a perfectly good exercise of the power given.

I have before me in the present case a wide power which refers in particular to an appointment for the benefit of the issue of William Mewburn the younger or some of them as he should by deed or will appoint. For many years past a parent who desires to appoint for the benefit of his or her own issue or who is dealing with his or her own property has found it a wise precaution, in many cases, to defer the giving of an absolute interest to children and to provide for powers of management during the attaining of a vested interest and for powers of advancement limited to one-half of the presumptive or expectant share of the object of the power. Such clauses have almost invariably been inserted in properly drawn settlements and wills whereby young children have to be provided for. So common has a power of advancement become that the legislature has thought fit to give trustees a power of advancement at any time. This it has done by s. 32, sub-s. 1, of the Trustee Act, 1925, which is as follows: "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs: Provided that (*a*) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property;

and (*b*) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application."

In the present case I have to ask myself whether the power of advancement in clause 9 of the will of William Mewburn the younger goes beyond what is authorized by the power in the testator's will, which, in my view, it is necessary for me now to read. [His Lordship read it and continued:] In my view, a power of advancement of the character of the one before me, having regard to the terms of the power of appointment which I have just read, and to the circumstance that at the date at which the instrument creating the power was made such a provision was common form, is valid as being a provision "for the benefit of such issue or some or one of them as the said William Mewburn the younger shall by will or codicil appoint," and is therefore not objectionable on the ground that it was an attempt to delegate the power. I am glad to observe that questions of this sort will not arise in the case of trusts constituted or created after January 1, 1926, it being expressly provided by sub-s. 3 of s. 32 of the Trustee Act, 1925, that that section does not apply to trusts constituted or created before the commencement of the Act. With regard, therefore, to settlements and wills executed after that date, there will be no difficulties of the kind with which I have here had to deal.

Solicitors: *Sole, Sawbridge & Co., for Bailey & Cogger, Tonbridge.*

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[1932. P. 2718.]

Copyright—Broadcasting—Licence to British Broadcasting Corporation—Reception of Broadcast authorized for domestic and private use only—Receiving set at Hotel—Loud-speaker—" Performance "—Infringement—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2 ; *s.* 2, *sub-s.* 1.

On October 1, 1932, three songs of which the copyright was vested in the plaintiffs were performed with their consent at a cinema and the performance was broadcast by the British Broadcasting Corporation. By an agreement dated February 8, 1932, the plaintiffs had licensed the Corporation to broadcast songs from time to time in their repertoire, but the licence authorized and covered " the audition or reception of copyright musical works by means of broadcasting for domestic and private use only." By means of a receiving set and loud-speaker at a hotel belonging to the defendants the songs were made audible to visitors to the hotel. It was admitted that if what the defendants had done amounted to a performance, it was a performance to the public.

Held, by the Court of Appeal (affirming the decision of Maugham J.), that by rendering the songs audible through their receiving set, the defendants had given or authorized a " performance " within s. 35, sub-s. 1, of the Copyright Act, 1911; that, as the licence to the Corporation did not authorize the reception of the songs by means of broadcasting otherwise than for domestic and private use, the performance, being admittedly a performance to the public, was given without the plaintiffs' consent; and therefore that the performance constituted an infringement of the plaintiffs' copyright.

WITNESS ACTION.

On October 1, 1932, three musical works of which the copyright belonged to the plaintiffs were performed at a cinema at Hammersmith and broadcast by the British Broadcasting Corporation under a licence granted to them by the plaintiffs by an agreement dated February 8, 1932. The manager of the George Hotel, Brighouse, Huddersfield, had installed a wireless set, including a loud-speaker, on the premises, and these musical works were by means of the wireless set made audible to persons visiting the hotel.

By the agreement of February 8, 1932, the plaintiffs had granted for valuable consideration to the Corporation for the year 1932 "licence and authority": "(i) To perform and/or broadcast or cause or allow to be performed and/or broadcast publicly at or from all or any of the Corporation's broadcasting stations, studios or other premises used by them for broadcasting purposes in Great Britain, Northern Ireland and the Channel Islands or the Isle of Man, to which the public are not admitted on payment (hereinafter referred to as the licensed area)

(ii) To perform for the purpose of broadcasting and to broadcast or cause or allow to be performed for the purpose of broadcasting and to broadcast publicly from any hall or public place at which a broadcast performance is given by the direction or under the auspices or control of the Corporation within the licensed area

(iii) To broadcast or cause or allow to be broadcast publicly from any hall, theatre, or other place of public entertainment or public resort or from any hotel, restaurant, concert room, café or the like at which the performances are not under the direction or the direct authority, management, or control of the Corporation but are by or under the direct authority, management, or control of some other person, firm or company

All or any such musical works as at any time during the continuance of this licence are or may be included in the repertoire of the Society," i.e., the plaintiffs, "and which the Corporation may elect to perform for the purpose of broadcasting within the licensed area."

Clause 2 provided: "This licence authorizes and covers the audition or reception of copyright musical works within the repertoire for the time being of the Society by means of broadcasting for domestic and private use only."

The plaintiffs brought this action against the owners of the hotel for an injunction to restrain the defendants, their servants or agents from infringing their copyright by performing and/or authorizing the performance in public of the three musical works or any other musical work of which the right of performance was in the plaintiffs, without their consent.

The defendants did not dispute that, if they had given a performance by rendering audible through a loud-speaker the musical works broadcast by the Corporation, it was a performance in public; or that the agreement of February 8, 1932, did not purport to authorize the Corporation either to broadcast the plaintiffs' copyright musical works otherwise than for domestic and private use or to allow persons with receiving sets to use them for the purpose of entertaining the public generally.

The report of an expert witness called on behalf of the plaintiffs was by consent admitted in evidence. The effect of the report, which was accepted by Maugham J., is sufficiently stated in his judgment. Subject to some criticisms by the writer of the report, the Court also accepted a diagrammatic representation, put in by the defendants, of what took place in the transmission of sound in various ways, including its transmission by means of the ordinary broadcasting system in use in Great Britain.

At the hearing the plaintiffs did not press for an injunction but asked to have their rights declared.

Hon. S. O. Henn Collins K.C. and *K. E. Shelley* for the plaintiffs. In the broadcasting station sound, as such, does not get beyond the microphone. From the station come electrical waves which by means of the appropriate apparatus operated at the receiving station can be transmitted into air waves, the result being that the original impulses which actuated the diaphragm of the microphone are reproduced with more or less accuracy. It is difficult to see why a person who chooses to convert these carrier waves into sound is not himself giving an acoustic representation. It seems patent that there is no distinction between that and the action of a person who plays a record on a gramophone for the benefit of the assembled public. The question has been decided in the United States of America in *Buck* v. *Jewell-LaSalle Realty Company* (1), under a section of the American Copyright Act of March 4, 1909 (c. 320, 35 Stat. 1075), which does not differ substantially from the corresponding section of the Copyright Act, 1911. A public performance by means of a gramophone record without the consent of the owner of the copyright is an infringement: *Thompson* v. *Warner Brothers Pictures, Ld.* (2) see also

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(1) (1931) 283 U.S. 191, 196.

(2) [1929] 2 Ch. 308.

Messager v. *British Broadcasting Co., Ld.* (1) where the question now before the Court was considered by McCardie J.

Sir Arthur Colefax K.C. and *A. W. Griffiths* for the defendants. There are two possible views of the judgment of McCardie J. in *Messager* v. *British Broadcasting Co., Ld.* (1): one is that a performance in private is by broadcasting made a performance in public; the other is that to broadcast is itself to perform in public. In each view the infringing act includes the audible reception as part of the infringement. It is impossible to dissociate the reception from the transmission as the plaintiffs here seek to do. The Court is asked to accept the point of view adopted in *Musikschutzverband* v. *Reichskartell der Musikveranstalter Deutschlands e. V.* (2), and accepted by the highest Court in Germany. In that case the question for decision was whether the defendants, who were a German body corresponding to the plaintiffs in the present case, had the exclusive right to reproduce, through loud-speakers in hotels and similar places copyright music broadcast by means of wireless telephony: and the German Court decided that they had not that exclusive right. By entering into the agreement of February 8, 1932, the plaintiffs purported to allow the reproduction of broadcast copyright songs for certain limited purposes. It is obvious that if they broadcast themselves they could not do anything of the kind; and they cannot, by entering into this arrangement, reserve rights beyond those which they would have if themselves broadcasting. There was at the hotel no performance within the meaning of the Copyright Act, 1911, and the judgment of McCardie J. in *Messager* v. *British Broadcasting Co., Ld.* (1) treats the act of broadcasting as being in fact an infringement because the audible reception must be included in the act. Accordingly there is no separate and distinct act capable of constituting an infringement when a loud-speaker makes audible the transmitted waves. The whole conception, upon which this action is based, of the possibility of subdividing the copyright owner's right is fallacious.

(1) [1927] 2 K. B. 543, 548.

(2) Entscheidungen des Reichsgerichts in Zivilsachen, 1932, Band 136, No. 74.

Hon. S. O. Henn Collins K.C. in reply. It cannot be disputed that an acoustic representation by means of a mechanical device took place at the hotel on the date in question. The argument for the defendants seems to involve the view that, inasmuch as the Corporation would be committing an infringement by broadcasting without the author's permission, what is heard at the other end is no infringement. The suggestion is that the plaintiffs must be deemed to have authorized that which they contemplated would happen, namely, that persons in sufficient number to constitute a public would hear the songs when broadcast, and that in that sense the plaintiffs have authorized a public performance none the less public because the members who hear it are not gathered together in one place. That argument does not assist the defendant company because the licence to the Corporation did not authorize performances in public through receiving sets. The plaintiffs allowed the Corporation to make available to those whom it concerned the means of giving an acoustic representation, but it was expressly made clear that the plaintiffs were not thereby intending to authorize an acoustic representation to the public. The position is precisely the same as that of a man who permits the making of a gramophone record of one of his works. He thereupon puts it in the power of those who have the proper appliances to make an acoustic representation of his work, but he does not thereby permit those who so desire to give a public performance of his work by means of the record. He merely permits private reproduction, which is not an exclusive right granted to him by the Copyright Act, 1911. The present case does not differ in principle from *Thompson* v. *Warner Brothers Pictures, Ld.* (1)

April 5. Maugham J. [after stating the facts:] The copyright claimed by the plaintiffs depends, I think, upon only three passages in the Copyright Act, 1911. Sect. 1, sub-s. 2, provides that, for the purposes of the Act, " copyright " means amongst other things, " the sole right to . . . perform . . . the work or any substantial part thereof in public," and I emphasize here the fact that to perform a musical work in private is not in

(1) [1929] 2 Ch. 308.

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any sense an infringement of copyright, apart, of course, from the case where you are performing it with the assistance of a piece of music which is itself an infringement of copyright. The next section to which I have to refer is s. 1, sub-s. 2, para. (*d*) by which it is provided that the word " copyright " shall include the sole right, amongst other things, in the case of a musical work " to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered." There, I mention in passing, the word " performed " is to be found. The next paragraph is in s. 35 (the definition section), where I find that " in this Act, unless the context otherwise requires . . . . ' performance ' means any acoustic representation of a work and any visual representation of any dramatic action . . . . including such a representation made by means of any mechanical instrument."

The plaintiff's claim is that what has been done is an infringement, that it involves the performance in public of a copyright work, and that that performance has not been authorized by the plaintiffs or by any person empowered to give that authority. The plaintiffs rely, I may mention here, upon *Buck* v. *Jewell-LaSalle Realty Co.* (1), a decision of the Supreme Court of the United States. The defendants take, as I understand it, two points. First, they deny that the use of a receiving set and a loud-speaker at their hotel for the purpose of making audible to guests in the hotel the musical works which are being relayed by a transmitting station of the Corporation is a performance at all, or at any rate they say that it is not a performance by the defendants. Secondly, the defendants take an altogether different point, namely that, assuming that the defendants are wrong in the first proposition, the plaintiffs, having licensed or authorized the broadcasting of the three musical works in question, have put it out of their power to prevent people with receiving sets and the usual loud speakers from using those sets and loud-speakers for the purpose of making audible the sounds to anybody they please. That, in effect, as I think, involves that such a limited licence as the

(1) 283 U. S. 191.

plaintiffs have granted to the Corporation is one which it is not open to them to give, or involves that, if such a limited licence is given, the limitations on the licence have no effect as regards third parties. The defendants rely on the case of *Musikschutzverband* v. *Reichskartell der Musikveranstalter Deutschlands e. V.* (1) a decision of the Supreme State Court in Civil Matters in Germany, affirming a decision of the Chamber Court and the Court of Appeal, which I have tentatively endeavoured to follow. The case is one in which the Music Protection Association were defendants in a suit brought by the Imperial Syndicate of Music Arrangers in Germany and other interested parties. The question raised was whether the participant in radio broadcasting infringes the copyright of the composer if he makes protected music audible through his loud-speaker for trade purposes. I should add here that there seems to be no English authority directly in point, but I have to mention that there is a dictum of McCardie J. in *Messager* v. *British Broadcasting Co., Ld.* (2) in which the learned Judge mentioned incidentally the following view: "it is, I think, reasonably clear that a person who gives to a public audience a performance made audible and effective to them by means of a receiving instrument in the place where that public is assembled together may be liable for infringement of copyright." That case went to the Court of Appeal and to the House of Lords and the decision was reversed on another matter, namely, the construction of a certain licence, but this particular passage does not seem to have been dealt with in the superior Courts.

I think that the arguments which have been presented to me on both sides have, perhaps not unnaturally, erred, if at all, in the direction of being too acute and too ingenious. From my point of view I think it is important to note in the first place this, that the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical, and, secondly, that the subject matter with which the Act is dealing is of a very practical and human kind, and that it involves really nothing

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(1) Entscheidungen des Reichsgerichts in Zivilsachen, 1932, Band 136, No. 74.

(2) [1927] 2 K. B. 543, 548.

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more than the advantages that works of the various sorts I have mentioned derive from the senses of sight or hearing possessed by the public as a whole. I think one ought to bear those circumstances in mind when construing the meaning of so common a word as "performance," and also possibly when considering the other proposition which is put forward on behalf of the defendant company.

I will try to state what I consider to be the first question and, at the risk of repetition, I will say that it is this: was the act of the defendants or their servants, in connecting up and tuning in their receiving set and supplying current for rendering the inaudible Hertzian waves which had been transmitted through the so called ether available for the purposes of producing vibrations of the air of audible frequencies, an act which resulted in a performance? As I have already said, it is admitted that, if it was a performance, it was a performance to the public. In answering the question I do not think it is necessary to go in great detail into the scientific explanation of what takes place. The radio-frequency currents which arrive at the place where the defendant company's loud-speaker is situate are selected by means of the well known tuning apparatus and led into the detector and thence are utilized for the purpose of generating from the radio-frequency currents audio-frequency currents which will conform exactly with the modulations of the original transmitted waves. I am quoting to some extent from Mr. Willans' report. "These currents," he says, "are introduced into the low frequency amplifier, the currents from which operate the loud-speaker and cause it to emit sound waves which are substantially a repetition of those impinging on the microphone . . ." which was, of course, at the transmitting station. "The loud-speaker is thus" he observes "a translating device of converse character to the microphone in that it converts electrical currents into sound vibrations." That process, in my opinion, is essentially a reproduction and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced by an instrument under the direct control of the hotel proprietor, and to my mind they are as much under his control as if his employee were turning a barrel organ or one of those distressing mechanical players which we sometimes used to hear. The fact that there is no power of selection is, I think, irrelevant to the question whether the sound amounts to a performance. The reproduction is, in my opinion, as much a performance as is a reproduction of a musical piece by a gramophone apparatus and if, as has to be admitted, that is a performance within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911 (see *Thompson* v. *Warner Brothers Pictures, Ld.* (1)), I can see no reason, having regard to the general observations that I have made as to the construction of the Act, why the loud-speaking apparatus is not also giving a performance. The musical piece is heard just as much as if a gramophone were being employed to do it and with just the same result from the point of view of the original author or his assigns. I repeat here that such a performance is not per se an infringement of copyright because to be that it has to be a performance in public. I am glad to note that the decision of the Supreme Court of the United States in *Buck* v. *Jewell-LaSalle Realty Co.* (2) exactly accords with my view on that part of the case, and I would add that, as far as I can see, s. 1 (*e*) of the American Copyright Act of March 4, 1909, does not differ very widely from the Copyright Act, 1911, which I have to construe.

I would say one word here with reference to *Musikschutzverband* v. *Reichskartell der Musikveranstalter Deutschlands e. V.* (3). I have been furnished with a translation of the relevant German section and I have very carefully read the German decision. I am not able to come to the conclusion that it is really dealing with the point with which I have to deal, and in any case the German system of law differs so much from ours, and may be so different with regard to their notions of permissible licences, and so forth, that I am afraid I cannot place any reliance upon it.

Now I come to the second point, and that is with reference to the effect of the licence given to the Corporation by the

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(1) (1929) 2 Ch. 308.

(2) 283 U. S. 191.

(3) Entscheidungen des Reichsgerichts in Zivilsachen, 1932, Band 136, No. 74.

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owners of the performing rights in question. Sect. 5, sub.-s. 2, of the Copyright Act, 1911, in my opinion has nothing to do with this point. That sub-section is dealing with the granting of interests in copyright either by means of complete assignments or by reason of partial assignments in the form of a licence, and in such a case the proviso that no such assignment or grant shall be valid unless it is in writing has, of course, to be borne in mind. Sect. 2 of the Act provides that "copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." Translating that into the subject matter of the present discussion, the copyright in these musical works has been infringed by the defendants if, without the consent of the plaintiffs, the owner of the performing rights, the defendants have performed the works in public. Looked at from that point of view, in my opinion it must be held that the defendants have infringed. They cannot, as I think, justify their act by saying that the Corporation broadcast the musical works. That, no doubt, entitled the defendants and their servants to listen to the works by the use of headphones, or by the use of loud-speakers, and members of the household and people of that sort are also entitled to listen and have the advantage of the broadcasting service not, perhaps, because that is directly authorized by the plaintiffs, but because it is not an infringement of copyright in any way for the musical sounds to be transmitted to them otherwise than in public. But the public (and, according to the authorities, that includes the ordinary visitors to an hotel) are in a different position and, in my opinion, the use of the receiving apparatus and the loud-speaker for the purposes of reproducing the works for the benefit of those guests is an act which was not justified or authorized by the licence given to the Corporation. Accordingly I shall make the declaration which the plaintiffs claim.

K. R. A. H.

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The defendants appealed. The appeal was heard on October 3 and 4, 1933.

Sir Arthur Colefax K.C. and *A. W. Griffiths* for the appellants.

Hon. S. O. Henn Collins K.C. and *K. E. Shelley* for the respondents.

The following additional cases were cited in argument: *Gambart* v. *Ball* (1); *Chappell & Co.* v. *Associated Radio of Australia, Ld.* (2); *Remick & Co.* v. *American Automobile Accessories Co.* (3); *Performing Right Society* v. *Bray Urban District Council* (4).

LORD HANWORTH M.R. This appeal raises an important point, but a point which has been fully and to my mind adequately dealt with and decided in the judgment of Maugham J.

The action was brought by the Performing Right Society who, it is conceded, have the sole right to perform in public the three musical works specified in the Statement of Claim. The allegation made by the plaintiffs in the action is that on or about October 1, 1932, the defendants infringed their rights by performing, or authorizing the performance of, these musical works in public at the George Hotel, Brighouse, Huddersfield, in Yorkshire, without their consent. The plaintiffs therefore claimed an injunction to restrain the defendants from giving any further unauthorised performance of such musical works.

The facts are not in dispute. It appears that the defendants made it possible by means of a loud-speaker for persons staying at their hotel at Brighouse, who were not included in what might be called the domestic circle of the person holding the wireless licence, to hear a representation of these works.

An agreement was entered into on February 8, 1932, between the British Broadcasting Corporation and the plaintiffs for the purpose of enabling the Corporation to broadcast certain musical works, the copyright of which was vested in the plaintiffs. [His Lordship read the material part of that agreement.]

I have referred to that agreement in order to show what was the nexus between the plaintiffs and the British Broadcasting

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(1) (1863) 14 C. B. (N. S.) 306.

(2) [1925] V. L. R. 350.

(3) (1925) 5 Fed. Rep. (2nd series) 411.

(4) [1930] A. C. 377.

Corporation. Its effect was to enable the Corporation to broadcast these particular musical works for the benefit of those whom I may call their customers, but it did not enable the Corporation to authorize a further transmission or performance of these musical works otherwise than for domestic and private use.

In the present case there was a performance at the Hammersmith Cinema of these musical works and the British Broadcasting Corporation took advantage of that performance to transmit the musical sounds provided at that performance to their customers. One of the customers to whom it was transmitted in the ordinary course was the manager of the George Hotel, Brighouse, Huddersfield. There something further was done. By means of an installation there which included a loud speaker the radio waves received at the George Hotel were converted into sound, audible not merely to the domestic circle of the George Hotel but to all its visitors. Without such an installation, the general company of the hotel would not have had the opportunity of hearing what had been broadcasted from the Hammersmith Cinema.

It is said by the defendants that they have in no sense infringed the copyright which unquestionably belongs to the plaintiffs. They do not contest that if what they did constituted a performance by them, it was a performance in public; but they say that there was no performance at all for which they were responsible and that the only performance that took place was the one in the cinema at Hammersmith. They say further that all that happened afterwards merely provided an extension of the audience for that performance, and that inasmuch as the performance at the Hammersmith Cinema was authorised by the plaintiffs, there was nothing left over which the plaintiffs could exercise the authority of their ownership. According to this argument, the performance was given and broadcasted once for all and what happened subsequently was merely a continuation of that performance; and they say that when once that performance at the cinema had been authorised, the rights of the copyright owners in respect of that performance were exhausted, and that if it was asked what the listeners at the George heard, the answer must be that they heard the performance at the Hammersmith Cinema. It follows, the defendants say, that the listeners heard an authorized performance, and the plaintiffs cannot now derogate from the permission which they gave, which was to cover, and did cover, the performance at the Hammersmith Cinema and its extension by the Broadcasting Corporation.

I turn now to the Act in which the rights of copyright owners are defined. A copyright subsists in respect of literary, dramatic, musical and artistic works, and by sub-s. 2 of s. 1 " copyright " is declared to mean " the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever " and " to perform . . . . the work or any substantial part thereof in public " ; and it includes the sole right to authorize any performance in public. So that there is placed in the hands of the owners of copyright the sole right to perform and to authorize the performance of works in public. More than that, by s. 2 sub-s. 1, the copyright in a work is to be deemed to be infringed " by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." If then a person performs, or authorizes the performance of, a musical work, he is deemed to infringe the right of the owner of the copyright, unless he can prove that he has the assent of the owner of the copyright to the course which he has taken. Section 35 defines what is " performance," and I think Mr. Henn Collins is right in calling attention to the fact that the definition is not of what is " a performance " but of what is meant by " performance." It is by the statute defined as meaning " any acoustic representation of a work . . . . including such a representation made by means of any mechanical instrument."

Bearing those sections in mind, what did the defendants do ? By the use of what I have called an installation, they made this performance at Hammersmith audible to a larger number of persons than would otherwise have heard it and to persons outside the domestic circle of the George Hotel. It was at the instance of the management that steps were taken to provide this entertainment. It appears to me that that act on the part of the management constituted on their part either a performance or the authorization of a performance.

Maugham J. said in his judgment that the process employed was "a reproduction and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced by an instrument under the direct control of the hotel proprietor"; and it seems to me, as it did to Maugham J., that the act done at the volition of the hotel proprietor constituted an invasion of the rights of performance, or authorization of performance, which are granted to the owner of a copyright by s. 1, and is by virtue of s. 2 to be deemed to be an infringement unless consent can be proved. That it was a performance seems clear, because it was an acoustic representation of a work.

I must, however, deal with the point insisted upon by Sir Arthur Colefax and Mr. Griffiths, namely, that the original consent to the performance at the cinema and the broadcasting of that performance exhausted the rights of repression which belonged to the owner, and that the unlicensed persons at the hotel who heard this performance did no more than persons who come forward and become listeners to an existing performance, as persons may be seen to gather round a performance provided at some watering place or well known centre of holiday attraction. Mr. Griffiths, in an argument full of scientific detail, asked us to treat what happened in this case as if it was merely the extension of the voice of a singer to enable it to reach a very large area by added mechanical means and energy. That illustration, to my mind, fails because in the present case the process of broadcasting would not have been sufficient to render the performance audible to those at the hotel, unless there had been some further contrivances there for the purpose of rendering the sounds audible. It is not as if the guests at the hotel merely looked in at the window at a peepshow which was there for all and sundry to see; but it was by the authority and at the instance of the proprietor of the hotel that steps were taken to render the sounds audible to the additional audience. In effect Mr. Griffiths' argument is that the singer can, by means of the broadcasting devices, be heard over an area of some hundreds of miles. But even so the sound would not reach the particular listeners at the hotel except for a further additional mechanical device.

To my mind the right view is presented in the words which are to be found in the judgment in the United States case of *Buck* v. *Jewell-LaSalle Realty Co.* (1), in which it is said: "The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1.) installing, (2.) supplying electric current to, and (3.) operating the radio receiving set and loud speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control." The judgment of McCardie J. in *Messager* v. *British Broadcasting Co.* (2) was to the same effect. There he said (3): "It was by means of electrical instruments that the defendants, by modulating the waves in the ether, were able to affect, as they intended to affect, a vast number of electrical instruments possessed by members of the public and thereby to render audible to that public the performance given within the walls of the defendants' studio. In my view, however, the defendants, in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognise the substance and reality of the matter and also the object and intent of the Copyright Act." He was dealing there, of course, with the Broadcasting Company itself, but the words that he used are applicable to the acts done in this case which had the effect of incorporating into the audience a larger body of persons than would have been reached without them.

(1) 283 U. S. 191, 201.

(2) [1927] 2 K. B. 543.

(3) Ibid. 548.

Upon the question of consent, there is really no evidence that there was any consent on the part of the plaintiffs. The licence granted to the British Broadcasting Corporation was limited by certain particular conditions, and it cannot be contended that the defendants themselves received a right to authorise or to give a fresh performance in public. The real point that the defendants make is that they merely took steps to intervene in a performance that was going on, a performance which was one and complete over the full distance covered, no matter how many people listened to it ; whereas it appears to me, as it did to Maugham J., that there was an effective intervention of a separate kind by the defendants themselves which rendered it possible for the guests at the hotel to hear the performance. That was in itself a separate performance, or an authorisation of a performance, and is prohibited by the terms of the Copyright Act.

For these reasons, in addition to those given by Maugham J., the appeal must be dismissed with costs.

LAWRENCE L.J. I agree ; and, for myself, would have been content to adopt as my own the judgment of Maugham J., but in deference to the arguments addressed to us by counsel for the appellants I will state in a few words my main reason for concurring with that judgment.

The real question in this case is whether the defendants, by putting their wireless receiving set into operation at their hotel in Yorkshire, while the musical works in question were being performed at the cinema in Hammersmith, were themselves performing or authorising the performance of those works at their hotel. It is conceded that if there was a performance of the works at the hotel the performance was in public. By s. 35 of the Copyright Act, 1911, the term " performance " is defined as meaning " any acoustic representation of a work." The question therefore resolves itself into whether the defendants, by operating their wireless set, were causing an acoustic representation of the works to be given at their hotel. In my judgment that question must be answered in the affirmative. The wireless receiving set by means of which alone the sounds were produced at the hotel belonged to and was under the control of, the defendants, who operated it for the purpose of giving to their customers at the hotel an acoustic representation of the musical works which were being performed at Hammersmith; but for the defendants having put their wireless set into operation there would have been no acoustic representation of the works at the hotel at all. I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is therefore himself performing or authorising the performance of the musical work within the meaning of the Copyright Act, 1911.

ROMER L.J. I need only add very few words, inasmuch as I entirely agree with the decision of Maugham J. and the reasons he gave for arriving at it.

There are two questions arising on the appeal. The first is: Did the defendants perform these musical compositions at the George Hotel in Huddersfield? In order to answer that question you must first find out what is the meaning of the word "perform." In my opinion a man performs a musical composition when he causes it to be heard. It is said by Sir Arthur Colefax that the person who caused these pieces to be heard at the George Hotel in Huddersfield was the person who sang the song at the cinema in Hammersmith. I disagree entirely. The man in the cinema at Hammersmith who sang the song caused it to be heard by any people who happened to be in the cinema and any people who were outside the cinema but near enough to hear him through the windows and doors; he in no way caused the people who were assembled in the George Hotel at Huddersfield to hear these musical compositions; that, in my opinion, was clearly done by the defendants.

They did it in this way. There was installed in the cinema by the British Broadcasting Corporation the necessary apparatus to enable them to utilise the sounds caused by the

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singer in the cinema for the purpose of creating vibrations or waves, as they are perhaps inaccurately called, in the ether, and, by reason of the fact that the defendants had installed in the George Hotel a receiving apparatus (that is, an apparatus which enabled them to utilise the waves in the ether caused by the British Broadcasting Corporation), for the purpose of producing vibrations of the air in the George Hotel corresponding exactly to the waves in the air which had been created by the singer in the cinema. That was done by the defendants, who put into operation the apparatus in the George Hotel, and, as it is called, tuned in; it is not the vibrations caused in the cinema that reach the hotel in Huddersfield, but there are produced by the means I have mentioned in the hotel at Huddersfield vibrations which are precisely equal in frequency to those produced at the cinema, and, as it turns out, are produced almost simultaneously.

Mr. Griffiths has invited us to treat this as a case in which the singer in the cinema has been endowed by recent discoveries with a stentorian voice which can reach Huddersfield. If we regarded him as the possessor of a voice reaching to Huddersfield, it must be remembered that the vibrations in the air only travel at about the rate of 1,000 feet a second, and, if we treat Huddersfield as being 200 miles from London, it would take just over fifteen minutes for the sound to reach the George Hotel; whereas, inasmuch as the vibrations in the ether caused by the British Broadcasting Corporation travel at approximately the rate of 186,000 miles a second, the sound is heard by means of what the British Broadcasting Corporation have done and of the receiving apparatus in the George Hotel about seventeen minutes before it otherwise would have arrived there, assuming the singer to possess the requisite stentorian voice. It has been said, and I have no doubt accurately, that such is the rate at which these waves travel that an Australian listener-in to a concert broadcasted from this country will hear the songs sooner than a person will who is situated at the back of the hall. In my opinion it is reasonably clear in the circumstances that the music is caused to be heard in the George Hotel by the action of the defendants, and that

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it is not, in the sense in which I have used the word, caused by the action of the singer in the cinema. To what extent it may be caused by the action of the British Broadcasting Corporation themselves is a question which we need not consider.

The second question that arises on the appeal is: Have the plaintiffs consented to this performance by the defendants in the George Hotel? The fact that they consent to a performance by the singer in the cinema is beside the mark when once one arrives at the conclusion that the performance of which complaint is made in this action was not a performance by the singer in the cinema. It is true that the British Broadcasting Corporation were granted a licence to broadcast, that is to say, to utilise the vibrations of the air for the purpose of causing these vibrations in the ether; and, inasmuch as it must have been known when that licence was given that the British Broadcasting Corporation were taking the licence for the purpose of enabling listeners-in to hear the music, it might be assumed, but for an express provision in the licence, that they had consented to the listeners-in hearing the music, that is to say, to their utilising their receiving apparatus for the purpose of producing the sounds. But, as was pointed out by Maugham J., in the licence given to the British Broadcasting Corporation by the plaintiffs, it is expressly provided that the licence "authorises and covers the audition or reception of copyright musical works within the repertoire for the time being of the society by means of broadcasting for domestic and private use only."

Therefore the plaintiffs have never consented to a utilisation by the defendants of their receiving apparatus for the purpose of causing this music to be heard, as admittedly in this case it was heard, by the public.

For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Syrett & Sons.*

Solicitors for defendants: *Godden, Holme & Ward.*

H. C. G.

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In re JOICEY.

JOICEY *v.* ELLIOT.

[1933. J. 428.]

Will—Construction—Child en ventre sa mère—Exercise of Power of Appointment to issue of appointor born in her lifetime—Appointment by Will to father of grandchild, in the event of father (a child of appointor) dying within twenty-one years from appointor's death "leaving issue him surviving"—Grandchild benefited indirectly through gift to parent.

A testatrix, in exercise of a power to appoint a trust legacy in favour of her issue born in her lifetime, by her will made in 1910 appointed that the legacy should after her death be held in trust for all or any her children or child who should survive her and attain the age of twenty-one years, if more than one in equal shares; and the testatrix directed that the share of each child should be retained upon trust during the period of twenty-one years from the testatrix's death to pay the income thereof to such child if he or she should so long live, and further that if such child should die within the said period, such share should be held in trust for such person or persons as such child should by will appoint, and in default of appointment (*a*) in the event of such child "leaving issue him or her surviving" in trust for such child absolutely, but (*b*) in the event of such child not leaving issue him or her surviving then such share should go and accrue to the share or shares of any other child or children of the testatrix, who should survive her and who should attain the age of twenty-one years, if more than one in equal shares.

The testatrix died on January 12, 1912, leaving (amongst other children who survived her) T., who died intestate on May 11, 1932 (namely, within the said period), without having exercised his power of appointment. T.'s wife, to whom he was married on April 14, 1931, and who survived him, was at the date of his death enceinte and on June 12, 1932, gave birth to a son. The question was whether or not T. died leaving issue him "surviving":—

Held, that, although the posthumous child of T. derived no benefit directly under the appointment in favour of its father, yet the benefit which the child derived indirectly owing to the non-defeasance of the gift to his father was sufficient to entitle the Court to treat the child as living and surviving his father.

Held, therefore, that the personal representative of T. was entitled to the share in question.

Per Romer L.J. Whether in any event the posthumous child should not be held to have survived his father, because he was in esse en ventre sa mère at the date of his father's death and was afterwards born alive, quaere.

Decision of Clauson J. [1933] Ch. 778 affirmed.

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APPEAL from a decision of Clauson J. (1).

By his will, dated August 6, 1879, John Joicey gave a legacy of 50,000*l.* to each of his daughters, other than his daughter Maud, and also a share of his residuary estate to each of them, including Maud, and settled the same legacies and shares upon trust to pay the income of the same to each such daughter during her life and after her death in trust as to principal and the future income thereof in trust for all or any the issue of each daughter, including grandchildren and more remote issue born in her lifetime as she should by deed or will appoint with trusts over in default of appointment. And the testator died on August 15, 1881, leaving four daughters, of whom one was Mrs. Rose Elliot.

Mrs. Rose Elliot, by her will dated March 1, 1910, in exercise of the power so conferred upon her by her father's will, appointed that all her share as well original as accruing in the said legacy and residuary estate, and also any other fund over which she might have any power of appointment under her father's will (hereinafter called "the appointed funds"), should after her death be held in trust for all or any her children or child who should survive her and being male should attain the age of twenty-one years or being female should attain that age or marry under it and if more than one in equal shares.

The testatrix then provided and directed that the share of the appointed funds to which each or any child of hers should become entitled under the appointment thereinbefore contained should be retained by the trustees upon trust during the period of twenty-one years from the death of the testatrix to pay the income of such share to such child if he or she should so long live. If such child should die within the said period, then the trustees should hold such share and the income thereof in trust for such person or persons and in such manner in all respects as such child should by will appoint. And in default of and subject to any such appointment upon the trusts following, namely : in the event of such child "leaving any issue him or her surviving" in trust for

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(1) [1933] Ch. 778.

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such child absolutely, but in the event of such child not leaving issue him or her surviving, then such share and the income thereof should go and accrue by way of addition to the share or shares in the appointed funds of any other child or children who should survive the testatrix and being male should attain the age of twenty-one years or being female should attain that age or marry under it and if more than one in equal shares. Lastly, it was provided that if such child of the testatrix should survive the said period of twenty-one years the trustees should hold the share or shares, whether original or accrued, of such child in the appointed funds and the income thereof in trust for such child absolutely.

By a codicil to her will dated October 15, 1911, the testatrix provided that in the event of any son of hers surviving her and attaining the age of twenty-one years (an event which happened) the share of any daughter of hers should not exceed the sum of 30,000*l.*

The testatrix died on January 12, 1912, leaving her surviving five children, three sons—namely, Robert, James, and Thomas, and two daughters.

Thomas Elliot, who was a domiciled Scotsman, died intestate on May 11, 1932, without having exercised his power of appointment under his mother's will. He was married on April 14, 1931, and at the date of his death there was no child born of his marriage, but his widow was then enceinte, and on June 12, 1932, she gave birth to a son.

Accordingly, an originating summons was taken out by the trustees of the testatrix's will for the determination of the question whether the share of the legacy of 50,000*l.* and of the residuary estate of the testator John Joicey, to the income of which Thomas Elliot was entitled during the period of twenty-one years from the death of the testatrix, belonged to the defendant James Leadbitter, as judicial factor on the estate of Thomas Elliot deceased, and as such the representative of his estate, or whether the said share went and accrued by way of addition to the shares of the defendants Robert Elliot and James Elliot in the said legacy and residuary estate.

The two daughters of the testatrix in the event, which happened, of their brothers surviving the testatrix and attaining the age of twenty-one years, were accordingly not interested in the question, and James Elliot, who was one of the defendants, was not represented at the hearing.

CLAUSON J. held, first, that, as the posthumous child of Thomas Elliot (although unborn at the date of the death of his father Thomas Elliot, but born after that date) was in existence en ventre sa mère at that date, that child was issue of Thomas Elliot surviving him, the word "surviving" not being confined to its literal primary sense; secondly, if the inclusion of a child en ventre sa mère within the meaning of the expression "issue him surviving" was conditional upon such child taking a benefit thereunder, that condition was sufficiently fulfilled by the probable (though indirect) benefit to the child through the gift to his parent; with the result that the personal representative of Thomas Elliot, deceased, was entitled to the share in question. He further held that although it was true that, for the purpose of conferring a benefit upon a child en ventre sa mère, such a child would be included in such an expression as "children living" at the death of the propositus, there was no rule of law that such an expression must necessarily be treated as not including a child en ventre sa mère unless such child took a benefit by his or her inclusion. He therefore held that the defendant James Leadbitter was entitled to the share in question as the representative of the estate of Thomas Elliot.

Robert Elliot appealed. The appeal was heard on Oct. 9, 1933. C. A.

Sir Gerald Hurst K.C. and *J. W. J. Cremlyn* for appellant repeated the arguments used by them in the Court below.

Wilfrid Hunt for James Elliot; *Vaisey K.C.* and *N. C. Armitage* for James Leadbitter, the representative of the estate of Robert Elliot; and *Howard Wright* for the trustees of the testator's will, were not called upon to argue.

LORD HANWORTH M.R. This appeal raises an interesting point. John Joicey made his will and died in 1881. Under his will Mrs. Elliot took a legacy and a share of residue and she made a will. She died on January 12, 1912, and the point that we have to determine arises upon her will. There were three sons of Mrs. Elliot, Robert, James Kerr and Thomas William Henry. Thomas William Henry Elliot married on April 14, 1931, and died on May 11 of the following year, 1932, intestate without having exercised the power of appointment which he at that time had under his mother's will. On June 12 of that same year 1932 a posthumous son was born to him. The question arises upon clause 5 (*b*) in the will of Mrs. Elliot which is as follows: "If such child shall die within the said period of twenty-one years then such trustees shall hold such share and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as such child shall by will or codicil appoint and in default of and subject to any such appointment upon the trusts following, namely, in the event of such child of mine leaving any issue him or her surviving in trust for such child of mine absolutely but in the event of such child of mine not leaving any issue" then over.

The question that arises is this: When Thomas William Henry Elliot died on May 11, 1932, did he die leaving any issue him surviving, inasmuch as there was a child born to him just about a month after his death? Can it be said of the father that he did leave any issue him surviving? It is quite plain from a number of cases which have been summarised in a number of decisions that the child en ventre sa mère may be treated as a child which is born or, it may be, as a child which is living for the purpose of the construction of such passages in a will. Farwell L.J. in a passage in *In re Salaman* (1), puts the matter in this way: "Whatever may be the meaning of the word 'born' in ordinary parlance, a rule of construction has been established which was stated forty-four years ago by Mr. Vaughan Hawkins, in my opinion with absolute accuracy, in his admirable treatise on Wills, in these terms (p. 79): 'RULE. A devise or bequest to children "*born*" or to children "*living*" at a given period, includes a child en ventre at that period, and born afterwards.' For that he cites *Doe* v. *Clarke* (1) and *Trower* v. *Butts*. (2) Then he gives the reason for the rule and adopts the language of Leach V.-C.: 'It is now fully settled, that a child en ventre sa mère is within the intention of a gift to children *living* at the death of a testator; not because such a child, (and especially in the early stages of conception) can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason and motive of the gift.' Then he goes on, still quoting from the Vice-Chancellor, 'Upon the whole, I am of opinion that, inasmuch as it is adopted as a rule of construction, that a child en ventre sa mère is within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift; so a child en ventre sa mère is to be considered within the intention of a gift to children *born* in the lifetime of a testator, because it is equally within the reason and motive of the gift.' The basis of the rule is that 'the potential existence of such a child places it plainly within the reason and motive of the gift'." There have been distinctions drawn in particular cases as, for instance, in *Blasson & Blasson* (3) to which attention is called by Chitty J. in his judgment in *In re Burrows* (4): "It is right that I should notice the case of *Blasson* v. *Blasson* (3), which has been cited. The question there was, as I read the case, on the words 'born and living'—words which seem to show that the testator contrasted birth with life. It was necessary there that the child should be both born and living; and the judgment of the Lord Chancellor is, in my opinion, directed solely to the word 'born'." So that you may have cases in which by the terms actually used you will find that the

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(1) [1908] 1 Ch. 4, 8.

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(1) (1795) 2 H. Bl. 399.
(2) (1823) 1 Sim. & St. 181, 184.
(3) (1864) 2 De G. J. & S. 665.
(4) [1895] 2 Ch. 497, 500.

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broad proposition as stated by Mr. Vaughan Hawkins and approved by Farwell L.J. will not carry the full purpose. If a distinction is drawn between "born" and "living" it may be that the rule as to en ventre sa mère will not be sufficient. But, broadly speaking, there stands the rule and I think it is of great importance to accept the rule as based upon the reason and motive of the gift.

In the present case when one looks at the passage in the will, to find the reason and motive of the testatrix in giving an absolute interest to her child where he leaves issue him surviving and not in the alternative case, they would appear to be in order to enable the father, where there is a child to succeed him, to provide for that child and so it may be a benefit to that child that the father should be placed in a position to do so.

But now it is said that to apply that rule in the present case you must find that there was an interest conferred not merely on the father but also on the child itself; and, that unless you can attach that interest to the child you cannot apply the rule, because the rule only applies where its application is for the benefit of the child. That point seems to have been determined in *In re Burrows* (1) by Chitty J. "Then it is said that the rule is that the child en ventre sa mère is not deemed to be living except where there is a benefit passing directly to the child; and as the mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority." He then goes through a certain number of authorities and in particular *Thellusson* v. *Woodford* (2), in which Lord Eldon gave his judgment and he comes to the conclusion that the benefit need not be one which can be appropriated to and attached to the child alone but that the interest of the child may be affected by the interest of the father or the mother and in that sense be its own interest. In answer to that it is said that however much the law may have stood in that way it is now not so by virtue of the decision in

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(1) [1895] 2 Ch. 497, 498.

(2) (1805) 11 Ves. 112.

Villar v. *Gilbey* (1). But when one has examined the speeches in *Villar* v. *Gilbey* (1) I can find no ground for saying that the decision of Chitty J. in *In re Burrows* (2) has been overruled and when I turn back to the judgment of Swinfen Eady J., as he then was, in *Villar* v. *Gilbey* (3), it would seem that the effect of the judgment was other than that contended for by Sir Gerald Hurst. His judgment, or the effect of his judgment, was restored by the House of Lords and in that case the only result of holding that the child was born at the testator's death would have been to reduce his interest from an estate tail to a life estate.

For these reasons it appears to me that the decision in *In re Burrows* (2) still stands good and has determined that we can look at the interest of the child in this case and hold that the decision which has been given by Clauson J. was for the benefit of the child, with the result that the appeal must be dismissed.

Lawrence L.J. I agree. Sir Gerald Hurst contended that the rule that a child en ventre sa mère at the date of its father's death ought to be treated as living at that date is only applicable to cases where it appears on the face of the instrument that it is for the direct benefit of the child that it should be so treated. In support of that contention he cited *Villar* v. *Gilbey* (1) and relied upon the statement of Lord Loreburn that the main stream of authorities put the rule upon the benefit to be derived by the posthumous child. No doubt the question whether the rule ought or ought not to be applied usually arises where there is a gift to such of children as should survive their father in which case the posthumous child if held to be living would take in competition with his brothers and sisters who had already been born. In such cases it is on the face of the instrument for the direct benefit of the child en ventre sa mère that it should be held to have been living at the death of its father. But in my judgment the contention that the rule is confined to such cases is not well founded. In both *Villar* v. *Gilbey* (1) and in *Blasson* v. *Blasson* (2) the expression used by the testator was "born" at the relevant date, whereas in present case the gift over is in the event of the father "dying without leaving issue him surviving." Clauson J. has come to the conclusion (following the decision of Joyce J. in *In re Griffiths' Settlement* (3) and applying the decision of Chitty J. in *In re Burrows* (4)) that the benefit referred to by Lord Loreburn in *Villar* v. *Gilbey* (1) was not confined to a direct benefit given by the instrument to the posthumous child but included a benefit which the posthumous child would naturally derive owing to the non-defeasance of a gift to its parent. In my judgment the conclusion so reached by the learned judge is right. Chitty J., in *In re Burrows* (4), in dealing with the argument that the rule is that the child en ventre sa mère is not deemed to be living except where there is a benefit passing directly to the child, stated (4) that that question was covered by authority and cited what was said by Lord Eldon in his judgment in *Thellusson* v. *Woodford* (5) referring to *Gulliver* v. *Wickett* (6). I will not read the passage again, but it clearly shows that the rule will be applied in order to save a defeasance of the interest of the parent of the posthumous child. Sir Gerald Hurst indeed contended that *Blasson* v. *Blasson* (2) decided that where the words of survivorship are used for the purpose merely of ascertaining a period of time and not for the purpose of describing the objects to take the rule ought not to be applied. In my opinion *Blasson* v. *Blasson* (2) did not decide any such broad proposition: in that case it was clearly for the benefit of the posthumous child to hold that it was not a child "born and living" at the date of the testator's death within the meaning of the will because the will directed the income to be accumulated and the capital and accumulations to be distributed when the youngest of the children of the nephews of the testator who should be born and living at the testator's

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(1) [1907] A. C. 139.
(2) [1895] 2 Ch. 497.
(3) [1905] 2 Ch. 301.

(1) [1907] A. C. 139.
(2) 2 De G. J. & S. 665.
(3) [1911] 1 Ch. 246.
(4) [1895] 2 Ch. 497.
(5) 11 Ves. 112.
(6) (1745) 1 Wils. 105.

decease should attain twenty-one years. It was contended that the accumulation ought to go on until a child of a nephew which was en ventre sa mère at the testator's death attained twenty-one. The Court rejected that contention with the result the posthumous child took equally with the other children of the testator's nephews at an earlier date than it would have taken if the rule had been applied. Moreover, in that case the words used were "born and living" and not merely "leaving issue surviving" as in the present case. In my judgment Clauson J. was clearly right in coming to the conclusion that in the present case the rule ought to apply and I cannot find anything in the speech of Lord Loreburn in *Villar* v. *Gilbey* (1) which should lead the Court to a contrary conclusion. Joyce J. in *In re Griffiths' Settlement* (2) was emphatic that the rule ought to be applied to a case under s. 33 of the Wills Act the wording of which seems to me for all practical purposes to be the same as in the present case and it is to be noted that *Villar* v. *Gilbey* (1) was cited to the learned judge.

For the reasons I have stated I agree that this appeal ought to be dismissed.

ROMER L.J. I agree. Since the decision of the House of Lords in *Villar* v. *Gilbey* (1) it must be taken to be settled law that a child who is en ventre sa mère at a particular time cannot be treated as being born at that time, unless it is to the interest of the child that he should be so treated. It is argued by Sir Gerald Hurst that the same rule applies to the word "living," that is to say, that a child en ventre sa mère at a particular time cannot be treated as living at that time, unless it be for the benefit of the child that he should be so treated. There is no doubt support, and weighty support, for that argument to be found in the judgment of Lord Loreburn in *Villar* v. *Gilbey* (1), though Lord Loreburn recognises in his judgment that there are cases justifying a construction which would include a child en ventre sa mère under the description "children living" at a particular time on the ground that children in utero are in fact living though he goes on then to say that the main stream of authorities puts it upon the earlier ground, that is to say, upon the ground that they are included because it is for their benefit that they should be so included in the particular case. On the other hand, I observe that Mr. Younger, as he then was, in his successful argument for the appellant in that case expressly called their Lordships' attention in his reply to the fact that in the case before them the word used was "born" and not "living," and he says this (1): "All the cases between 1718 and 1863 were 'living,' and not 'born.' The note referred to in Williams' Saunders dealt with perpetuities, and not construction. Davidson in the edition of 1861, vol. 3, p. 115, suggested that the word 'born'"—and this was in a defeasance clause, that is to say, in a clause cutting down the interests of children born in the testator's lifetime from estates tail to estates with remainder over—"might be replaced by 'living' or 'in esse,' so as to include the posthumous children, conceiving that 'born' would not include them," and then he refers to other books of precedents. Lord Atkinson in his judgment referred to Mr. Younger's reply in terms of approbation. So did Lord Robertson. In those circumstances, therefore, if it were necessary to come to a final conclusion on that point personally I should like to take further time to consider the matter, for there are numerous authorities on the point. But I think it is unnecessary to express an opinion on the point for this reason, that assuming the same construction has to be applied to the word "living" as is applied to the word "born" I still think that it is for the benefit of the posthumous son in this case to adopt a construction of the word "living" that would include him. The very point as has been stated by my Lords, arose before Chitty J. in *In re Burrows* (2). He said there was ample authority for the decision that he arrived at, namely, that it was not necessary that the child to be included should take a direct benefit under the instrument

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(1) [1907] A. C. 139.

(2) [1911] 1 Ch. 246.

(1) [1907] A. C. 139, 143.

(2) [1895] 2 Ch. 497.

which was being considered, but that it was sufficient if he took an indirect benefit, the indirect benefit in *In re Burrows* (1) being that his mother's estate should not be divested. Chitty J. after stating that the matter was covered by authority referred to the statement by Lord Eldon to which the Master of the Rolls has already called attention.

In those circumstances it appears to me the decision of Clauson J. was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Coulson & Coulson*; *Martineau & Reid*; *Walker, Martineau & Co.*; *Stibbard, Gibson & Co.*

W. I. C.

In re DIPTFORD PARISH LANDS
AND
In re the CHARITABLE TRUSTS ACTS, 1853 TO 1925.

LUXMOORE J.
1933
March 28.

Charity—Charity Commissioners—Order for Establishment of Scheme—Ancient Parochial Charities—"Definitive publication of any order of the said Board"—Right of appeal from order—Petition—Time limited for appeal —Three months from publication of order—Charitable Trusts Act, 1860 (23 *&* 24 *Vict. c.* 136), *ss.* 2, 6, 7 *and* 8*—Charitable Trusts Act,* 1869 (32 *&* 33 *Vict. c.* 110), *s.* 11.

On an appeal, by leave of the Attorney-General, from an order of the Charity Commissioners establishing a scheme for the administration of charities, the petition to the Court must under s. 8 of the Charitable Trusts Act, 1860, be presented within three calendar months next "after the definitive publication of the order," which is effected under s. 7 of the Act by affixing a copy of the order when made in some convenient place within the parish or in the district to which the charity is applicable such as on the church door, and an appeal presented more than three months after the date when the order is first so affixed is out of time.

A petition for appeal, to be presented under s. 11 of the Charitable Trusts Act, 1869, under the hand of the appellant, may be signed by the appellant's solicitor or other duly authorised agent.

In re Hackney Charities (1864) 34 L. J. Ch. 169; 12 W. R. 1129, 1131 explained and applied.

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(1) [1895] 2 Ch. 497.

LUXMOORE J.

1933

DIPTFORD PARISH LANDS, *In re* AND CHARITABLE TRUSTS ACTS, 1853 TO 1925, *In re the.*

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PETITION.

This was a petition presented by the Rector, Churchwardens and Parochial Church Council of the parish of Diptford in the County of Devon praying that a scheme relating to certain old charities in the parish and which had been presented to the Board of Charity Commissioners and sealed by an order of the Board dated October 11, 1932, might for the reasons therein set forth be rescinded, and in so far as not rescinded, be altered or amended; and also that the petition might be directed to be served on such persons other than the Charity Commissioners as the Court might think fit.

The material facts are shortly as follows:

By a Deed Poll dated in the 7th year of King Henry VI., one Walter Toker of the said parish of Diptford granted certain lands and tenements in the see of Beenley unto grantees and their heirs to the use of the parish church of Diptford in the county of Devon.

By another Deed Poll dated September 14, 1594, one John Hayes gave to William Vowell and three others and their heirs, a share of and in certain messuages and lands at Farleigh in the parish of Diptford to the intent that they should stand seised thereof to the use and relief of the poor within the said parish of Diptford, the reparation of the Parish Church and other necessaries within the parish as should by the feoffees and their heirs together with the greater part of the parishioners of Diptford be thought most meet, and it was thereby directed that the feoffees or their heirs when required by the greater part of the parishioners of Diptford to enfeoff the same lands and tenements to other persons appointed to be feoffees of the said parish, should have power to do so to the same or such like uses, intents and purposes.

By an indenture of feoffment dated April 5, 1748, one Richard Jackson and others as the surviving feoffees of the parish lands of Diptford granted to one John Fowell and others a tenement known as Blakewell and the eighth part of certain messuages at Farleigh in the parish of Diptford, being part of the parish lands; and also two messuages at Cheston in the parish of Ugborough which last mentioned premises had been purchased out of moneys accumulated by the feoffees and included in the common stock of the said parish. These properties were conveyed upon trust to permit the churchwardens of the parish of Diptford to collect the rents and profits, which were to be paid and applied for the repairing of the parish church of Diptford and the maintenance and relief of the poor of the parish or such other charitable uses as the feoffees thereby created or any three of them, being the major part present at a vestry meeting at Diptford, held in pursuance of notice, should in their discretion think fit.

All the rents and profits of the above properties (known as the Diptford Parish Lands) were from the respective dates of their acquisition wholly applied towards the repair and improvement of the parish church down to the year 1821 and onwards to the present time. A small wooded portion of these properties was kept in hand, and timber cut from them was used for the same purpose. Up to 1821 no part of the rents and profits was used for poor relief.

The Diptford parish lands at the date of the petition consisted of (1.) Blakewell Farm containing 63 a. 1 r. 37 p. let at 95*l.* per annum, being the lands given by Walter Toker, (2.) land known as The Deer Park, Farleigh, containing 3 acres, let for 7*l.* 12*s.* 6*d.* per annum, representing the land given by John Hayes in 1594 and (3.) land known as Lower Cheston, together with certain messuages thereon, containing 18 a. 2 r. 34 p. let for 40*l.* per annum, being the land purchased out of the common stock and conveyed to trustees before 1748.

On December 23, 1931, an application in writing was made by Major Gerald Marcel Conran, D.L., J.P., James Cornish-Bowden, John Luscombe and Frederick Charles White, a majority of the trustees of the Diptford Parish Lands, to the Charity Commissioners asking for an order establishing a scheme for the administration of the charities and giving all necessary incidental directions. On October 11, 1932, the Charity Commissioners sealed a scheme numbered E/10288 based on this application. By the scheme all the lands of the original charity and the endowments thereof were vested in the Official Trustee of Charity Lands. The Board declared that the original charity should be divided and administered and managed as two separate charities, to be called the Parish Lands ecclesiastical charity and the Parish Lands eleemosynary charity.

The ecclesiastical charity was to consist of the lands given by Walter Toker and one-third of the income of the remaining lands, and was to be managed by a body of trustees, of whom three were to be appointed by the Parochial Church Council and three were to be co-opted. The eleemosynary charity was to consist of the lands numbered (2.) and (3.) above and two-thirds of the net income of such lands, and was to be managed by a body of trustees, three to be appointed by the Parish Council of Diptford, one by the Parochial Church Council and three co-opted trustees. The trustees of the eleemosynary charity were, after payment of expenses of management out of the income, to pay one-third of the net income to the trustees of the ecclesiastical charity. The effect of the scheme was to give the ecclesiastical charity a gross income of 110*l.* 17*s.* 6*d.* and the eleemosynary charity a gross income of 31*l.* 15*s.* 6*d.* The scheme named five of the existing trustees from whom the first three co-opted trustees for both charities should be selected.

The available income of the eleemosynary charity was to be applied under one or more of the following heads, for the benefit either of the poor of the parish of Diptford generally, or of such poor persons not in receipt of poor-law relief other than medical relief as the trustees might select for the purpose, namely (1.) subscriptions and donations in aid of the funds of any dispensary, infirmary, hospital or convalescent home, (2.) grants or contributions towards the travelling expenses of patients to and from such institutions, (3.) grants for the assistance of qualified persons under the age of 21 years entering upon any trade, occupation or service, by outfits, payment of fees for instruction or travelling expenses or other means to enable them to earn their own living, (4.) the supply of clothes, boots, linen and other articles in kind and of temporary assistance in money, by way of loan or otherwise, in case of sickness, special distress or unexpected loss. It was further provided that the income should in no case be applied in aid of any rates for the relief of the poor, or so that any individual or institution might become entitled to a periodical or recurrent benefit therefrom. There were various other provisions relating to the constitution, meetings, etc., of the trustees.

Notice of the intention of the Board to make an order for the scheme, and a copy of the draft scheme were affixed to or near to the door of the parish church, and at the Diptford Post Office on March 12, 1932. The order having subsequently been made and sealed on October 11, 1932, was published by being affixed to the church door on October 28, 1932.

In the meantime the Parochial Church Council, including the Rector and Churchwardens, instructed their solicitors Messrs. Kellock and Cornish-Bowden of Totnes to oppose the scheme, and a correspondence with the Charity Commissioners ensued.

The scheme was opposed (inter alia) on the following grounds :—That the scheme was contrary to the provisions for the protection of the Church of England in s. 46 of the Charitable Trusts Act, 1853, that the parish lands should remain under the control of the Rector and Churchwardens and the Parochial Church Council, that the Vestry would lose the power of nominating the trustees and the right to examine the accounts from time to time, that there were very few real poor in the parish, for whom provision was duly made out of the rates, that the scheme was not acceptable to the parish generally or to the Parochial Church Council and was in conflict with the rule that income of a charity should not be applied in relief of the rates.

On February 4, 1933, the petitioners, the Rev. Henry Mark Sutton, Rector, the Churchwardens and the Parochial Church Council gave notice of appeal, and applied to the Attorney-General for his fiat for leave to appeal from the order of the Charity Commissioners establishing the scheme. On February 27, 1933, the Attorney-General granted his fiat enabling the petitioners to present their petition to the

High Court under s. 8 of the Charitable Trusts Act, 1860, and ss. 10 and 11 of the Charitable Trusts Act, 1869. The Attorney-General however reserved the right when the petition came before the Court to raise the questions whether it had been presented within three months next after the definitive publication of the order of the Charity Commissioners as required by s. 8 of the Act of 1860, and whether the notice served under s. 11 of the Charitable Trusts Act, 1869, was a valid notice, inasmuch as it was not under the hand of the appellants, but of their solicitors.

G. M. Edwardes Jones K.C. and *A. P. Vanneck* for the petitioners.

Stafford Crossman for the Attorney-General took the preliminary objection that the presentation of the petition was out of time having regard to the date of the publication of the Order of the Charity Commissioners—namely, on October 28, 1932.

The Court has no jurisdiction to hear this petition now. The date of definitive publication of the order was the affixing of it to the church door on October 28, 1932. See the Charitable Trusts Act, 1860, ss. 6, 7 and 8, and *In re the Hackney Charities.* (1) Further, under s. 11 of the Charitable Trusts Act, 1869, the petition must be presented under the hands of the appellants themselves and by no one else.

J. H. Stamp for the Board of Charity Commissioners.

G. M. Edwardes Jones K.C. in reply.

LUXMOORE J. This is a petition, by way of appeal against the establishment of a scheme for the administration of a charity known as "the Diptford Parish Lands." The petition is presented under s. 8 of the Charitable Trusts Act, 1860. Two preliminary points have been taken. First it is said that the petition is out of time, as it is presented more than three months after the publication of the "definitive order," referred to in the provisions of the Charitable Trusts Act, 1860; and secondly, that the notice to the Attorney-

(1) (1864) 34 L. J. Ch. 169.

General preliminary to the presentation of the petition must, under s. 11 of the Act of 1869, be made under the hand of the appellants. The notice was signed by the solicitor to the appellants, and it is therefore said that the fiat has not been properly given.

I will deal with the two preliminary points in the order in which I have stated them. So far as the first point is concerned, the answer depends entirely on the construction of the Charitable Trusts Acts. Section 2 of the Charitable Trusts Act, 1860, provides: "The Board of Charity Commissioners . . . . subject to the restrictions and rights of appeal hereinafter provided, shall have power from time to time, upon the application of"—certain persons who are there referred to—"to make such effectual orders as may now be made by any Judge of the Court of Chancery sitting at Chambers, or by any County Court"—among other things—"for the establishment of any scheme for the administration of any such charity." That is the section which gives the Charity Commissioners power to make schemes. Then s. 6 provides, and I am reading it only so far as the words apply to the petition before me: "No order . . . . establishing a scheme for the administration of any charity, shall be made by the said Board before the expiration of one calendar month after public notice of the proposal to make such order shall have been given, as they may consider most expedient and effectual for ensuring the publicity thereof, in each parish or district in which the charity, if of a local character, shall be applicable, or among all persons interested therein; . . . . and every notice hereby required shall contain (so far as conveniently may be) sufficient particulars of the objects of the proposed order, and shall prescribe a reasonable time within which any objections thereto or suggestions thereon may be made or transmitted to the Board; and the said Board shall receive and consider all such objections and suggestions, and may withhold, suspend, or modify their proposed order, as they shall thereupon, or in the result of further inquiry, or otherwise, think expedient." Sect. 7 deals with the procedure after the Board have complied with the provisions of s. 6 and is as follows: "A copy of every such order when made shall, in the case of any local charity, be deposited for the space of one calendar month in some convenient place within the parish or one of the parishes or in the district in which the charity shall be applicable, and shall be open to public inspection there at all reasonable hours during the same period; and a copy also of every such order relating to any charity, whether local or general, shall be kept, open to public inspection at all reasonable hours, at the office of the Commissioners, during a like period of one calendar month; and in each case effectual publicity shall be given to the making of the order by such means as the Board shall consider most expedient for that purpose." Sect. 8 is the section which provides the right of appeal: "The Attorney-General, or any person authorised by him, or by the said Board, in the case of any charity, whatever may be the yearly income of its endowments . . . . may, within three calendar months next after the definitive publication of any order of the said Board . . . . establishing a scheme for the administration of the charity, present a petition to the High Court of Chancery in a summary way, appealing against such order, and praying such relief as the case may require . . . . but no such petition of appeal shall be presented by any person, other than the Attorney-General, before the expiration of twenty-one days after written notice, under the hand of such appellant, of his or her intention to present such petition, shall have been delivered to the said Board at their office."

Sect. 11 of the Charitable Trusts Act, 1869, provides: "A petition shall not be presented to the Court of Chancery by any person under s. 8 of the Charitable Trusts Act, 1860, before the expiration of twenty-one days after written notice under the hand of the appellant of his intention to present such petition has been served on the Attorney-General by delivering the same to the solicitor who acts for him in ex officio proceedings relating to charities."

It appears from those sections to be necessary, first that the Charity Commissioners should give public notice of their proposal to make an order establishing a scheme. Having given that notice, an opportunity for making objections and suggestions must be allowed; and the Board, having considered any objections and suggestions, are empowered to make an order under s. 2. When the order has been made it is provided by s. 7 that the order should be published by the Commissioners. The method of publication is laid down in precise terms, viz. :—" A copy of every such order, when made shall . . . . be deposited . . . . in some convenient place," and so on. Sect. 8 gives a statutory right of appeal, and provides a time limit of three months next after the definitive publication of the order.

After reading the revelant sections I have no doubt that the " definitive publication of any order " of the Board refers to the publication of the order as required by the provisions of s. 7. My attention has been called to a decision of Lord Romilly in the matter of *In re The Hackney Charities* (1), which has been relied upon by the petitioners as supporting a different view. Mr. Edwardes Jones argued that this case in effect decided that there could be no definitive publication until at least one month had elapsed after the deposit of the order under s. 7 of the Act. Although it is difficult to ascertain the facts from the preliminary part of the report, it seems to me that, when you look at the judgment of the Master of the Rolls, he has taken the same view of the meaning of the sections as I have already expressed. The question which he had to deal with was: What was the date of the definitive publication of the order? Was it the date when the notice of the proposal to make an order was given under s. 6, or was it the publication of the order after it had been made in accordance with s. 7? The judgment as reported states: " The Master of the Rolls said he had a strong impression that there was no difficulty about his jurisdiction, and that the petitioners were entitled to appeal." I should say that in the particular case it appears that some notice was posted on November 14, and that that notice expired on December 14. The appeal was presented on March 12.

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(1) (1864) 34 L. J. Ch. 169; 12 W. R. 1129, 1131.

LUXMOORE J.
1933
DIPTFORD PARISH LANDS, *In re*
AND CHARITABLE TRUSTS ACTS, 1953 TO
TO 1925, *In re the*.

If the date of the definitive publication was not earlier than December 14, the petition was in time, and if it was November 14, it was out of time. There is nothing in the statement of facts to suggest that there was any notice under s. 6 other than that of November 14. It is quite plain that when the Master of the Rolls was dealing with the question he was considering whether definitive publication under s. 8 meant the giving of the notice under s. 6 or the depositing of the order required by s. 7. The only dates in question were November 14 and December 14 and the Master of the Rolls held that the definitive publication was on December 14 and that the petition was in time. This is made really reasonably clear by the following passage in his judgment: "By s. 8 of the Act of 1860, the appeal must be presented within three calendar months next after the 'definitive publication' of the order. By reference to ss. 6 and 7, it appeared that those words must mean the final publication, when the time expired for the receipt of suggestions and objections." The order could not be made until the time had expired for the receipt of suggestions and objections, and those are the very words which appear in s. 6 of the Act. Then he goes on to say: "The words 'definitive publication' were not contained in s. 7, but they were in the marginal note"—that is the words "definitive publication" refer to the order and not to the intention to make the order or anything of that sort, or to any notice which was given before the period for suggestions and objections had passed. It therefore seems clear that the learned judge was choosing between the provisions of s. 6 and s. 7 in order to come to a conclusion as to the meaning of the reference in s. 8 to "definitive publication." The words of the section refer to the publication of the order of the Board and not to notice of the intention of the Board to make such an order.

Mr. Edwardes Jones has said that *In re The Hackney Charities* (1) has been followed in the contrary sense on a number of occasions. My attention has not been called to any such authority. So far as the reference to it in Tudor on

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(1) 34 L. J. Ch. 169; 12 W. R. 1129.

Charities is concerned, it seems to me that the statement of it is entirely in accordance with what I believe to be the correct reading of the judgment. I refer to the statement in the 5th ed. at p. 587, that the time for appeal runs from the time fixed for the final publication of the order of the Charity Commissioners, that is the publication of the order in accordance with s. 7.

I think that I should state the material dates in the present case so that there may be no confusion on the matter. Public notice of the proposal to establish the scheme was, it is now admitted, given on March 12, 1932.

A period elapsed in which objections and suggestions were to be made, and on October 11, 1932, the Charity Commissioners made their order. They published it on October 28, 1932, by affixing it to the church door. Accordingly, the date of the definitive publication under the Act was October 28, 1932, and the time for appeal therefore expired on January 28, 1933. This petition was presented on February 27, 1933. The time for appealing is a statutory matter. I have no means or power, even if I so desired, of extending the time. In my judgment the first preliminary objection succeeds and I must hold that the right to appeal is no longer in the petitioners.

It is convenient that I should deal with the second point, as it has been raised. It was also said that the petition was not properly presented, because the notice, which is a condition precedent to the presentation of the petition, was not under the hands of the appellants. I do not think that it would be correct to read s. 11 of the Act of 1869 as requiring actual physical signature by an appellant. I think it is quite sufficient if an appellant signs the notice by his duly authorised agent. There might be reasons which made it impossible for a person to sign, or even to make his mark. The appellant in the present case is a Parochial Church Council. How can such a body sign under its own hand ? I think there is no substance in the second objection. I hold that the petition has been presented out of time, and there is now no right of appeal in the appellants against the order

LUXMOORE J.

1933

DIPTFORD PARISH LANDS, *In re* AND CHARITABLE TRUSTS ACTS, 1853 TO 1925, *In re the.*

of the Charity Commissioners establishing this scheme. In the circumstances, I must dismiss the petition with costs.

Solicitors: *Church, Rendell, Bird & Co., for Kellock & Cornish-Bowden, Totnes; Treasury Solicitor.*

A. R. T.

Criticised and distinguished. Re COATS' TRUSTS. [1948] 1 All E.R. 521.

LUXMOORE J.

1933

Nov. 1, 6.

In re CAUS.

LINDEBOOM *v.* CAMILLE.

[1932. C. No. 464.]

Will—Charitable Gift—Bequest of money for the saying of Masses—Masses for the souls of particular persons.

A Roman Catholic testator by his will bequeathed "1000*l.* for Masses, foundation and others" and also devoted four houses "for one foundation Mass to be said for my soul and the souls of my parents and relatives during the space of twenty-five years," and directed that the property should revert to a named church. Evidence was given that by a "foundation Mass" was intended a Mass the saying of which was to be paid for out of the interest of an invested fund, so that unless the gift was charitable it would be void for perpetuity.

Held, that a gift for the saying of Masses is charitable as being for the advancement of religion (1.) because it enables a ritual act to be performed which is the central act of the religion of a large proportion of Christian people, and (2.) because it assists in the endowment of priests whose duty it is to perform the act.

The summary of the evidence of Dr. Delaney as set out in *O'Hanlon v. Logue* [1906] 1 I. R. 247, accepted as a definition of the nature of a Mass applicable to this case: *West* v. *Shuttleworth* (1835) 2 Myl. & K. 684, and *Heath* v. *Chapman* (1854) 2 Drew. 417, dissented from.

ADJOURNED SUMMONS.

This summons raised the question whether a gift in a will of a Roman Catholic priest for the saying of Masses was charitable or not.

By his will dated September 6, 1927, The Very Reverend Francis Caus, a Canon of St. Peter's Catholic Church at

Leicester, after giving 2000*l.* for a home for aged Catholic parishioners, continued "1000*l.* for Masses, foundation and others—my four houses at Great Holme Street I leave for one foundation Mass to be said for my soul, and the souls of my parents and relatives, during the space of twenty-five years, and the property to revert to the parish of St. Peter's Roman Catholic Church for extension purposes." The testator appointed the Rev. Father Lindeboom to be his executor.

The testator was a Belgian by birth but had for some 25 years before his death been the parish priest of St. Peter's Roman Catholic Church at Leicester, and had for one year before his death been a Canon of Nottingham Cathedral, and he was at his death domiciled in England.

The testator died on January 18, 1931, and his will was proved in the Principal Probate Registry on February 14, 1931, by the executor. There was sufficient estate to enable the 1000*l.* bequeathed for Masses to be paid at once. The testator left him surviving two sisters and three children of a deceased sister.

The four houses in Great Holme Street mentioned in the will were freehold houses which had been purchased by the testator. They adjoined St. Peter's Church and had been valued for probate at 540*l.* They were let on weekly tenancies.

It was proved by the evidence on the summons that the term "Foundation Masses" described Masses the saying of which was provided for out of the income only of an invested fund. The amount of the payment for the saying of a Mass had a minimum of five shillings, and it was calculated that the proper amount to be provided for foundation Masses under the bequest would be 250*l.*, which would be invested at the discretion of the Bishop. The balance of the 1000*l.* would be applied until the amount was exhausted in payment for the saying of General Masses for the person providing the money, and such General Masses would be in addition to the ordinary Masses.

Questions arose whether the Masses referred to in the will were the subject of charitable bequests or not. If the bequests were not charitable they would be void for perpetuity and the money so bequeathed would be undisposed of and go to the testator's next of kin.

The executor issued this summons for this question (inter alia) to be decided on January 29, 1932, and the defendants were the two sisters of the testator and the three children of a deceased sister as the testator's next of kin, and His Majesty's Attorney-General.

G. D. Johnston for the plaintiff.

H. B. L. Braund for the sisters of the testator.

I submit that a gift for foundation Masses is not a good charitable gift. A foundation Mass means a Mass for which the payment is provided by the interest of an invested fund during a time such that the gift, unless it can be shown to be charitable, is void. In *Bourne* v. *Keane* (1) the decision was only that a gift for a Mass was not a superstitious use, and it did not affect the question whether the gift was charitable. A Mass may be said in general or for some particular person or class. In the latter case it is not for any public benefit or for any general purpose. There are two decisions on the point both of which hold that a gift for a Mass is not charitable. In *West* v. *Shuttleworth* (2) the point was clearly decided and the decision was followed in *Heath* v. *Chapman.* (3) In *Yeap Cheah Neo* v. *Ong Cheng Neo* (4) an analogous point was decided. It was held that a Chinese gift of a house for the performance of religious ceremonies for the testatrix and her late husband was not a charitable gift, and *West* v. *Shuttleworth* was cited with approval as deciding an analogous point. In *O'Hanlon* v. *Logue* (5) the Lord Chancellor in Ireland summarised the evidence as to the nature of a Mass given by Dr. Delaney in *Attorney-General* v. *Delaney* (6), and I submit that this shows that a gift for a Mass is not charitable. The House of Lords in *Bourne* v. *Keane* (1) only decided that a Mass is not a superstitious use and left open the question which arises here, but there are passages in the speech of

(1) [1919] A. C. 815, 832, 845.
(2) 2 Myl. & K. 684, 698.
(3) 2 Drew. 417.
(4) (1875) L. R. 6 P. C. 381, 396.
(5) [1906] 1 I. R. 247.
(6) (1875) I. R. 10 C. L. 104.

Lord Birkenhead which bear out my contention. I submit that these gifts are not charitable.

L. R. Norris for the children of a deceased sister of the testator adopted Mr. Braund's argument.

Stafford Crossman for the Attorney-General. The gift is a good charitable gift for two reasons which appear from the evidence of Dr. Delaney as stated in *O'Hanlon* v. *Logue.* (1) First : It is for the advancement of religion as it enables a ritual act to be performed which is the most essential part of the religion of a great number of persons throughout the world, and it results in benefit for the whole body of faithful Roman Catholics. Secondly : It amounts to an endowment of the priests who say the Mass. In *In re Charlesworth* (2) it was held that a gift to provide dinners for a clerical society was charitable as adding to the efficiency of a religious body. I should mention that in Canada a decision was given adverse to my contention in *In re Zeagman* (3), but that decision does not bind your Lordship.

Cur. adv. vult.

November 6. LUXMOORE J. The testator was a Roman Catholic priest. By his will he left, among other gifts, 1000*l.* " for Masses foundation and others." He also left " my four houses—for one foundation Mass a month to be said for my soul, and the souls of my parents and relatives during the space of twenty-five years, and the property to revert to the parish of St. Peter's Roman Catholic Church for extension purposes." The will contained a residuary gift in favour of the testator's sisters and their children.

A number of questions arise on the will. I have decided them all except that relating to the gifts for Masses above referred to. Are such gifts charitable or not ? If the answer is in the negative the gifts fail for perpetuity, because, according to the evidence before me, a foundation Mass is said in perpetuity, and is paid for out of the income of an invested fund, and not out of capital.

(1) [1906] 1 I. R. 247.
(2) (1910) 101 L. T. 908 [1920] W. N. C. 18.
(3) (1916) 37 Ont. L. R. 536.

The question whether a gift for Masses is charitable or not has not been decided in any case in the English Courts since the decision in *Heath* v. *Chapman* (1), which followed a decision in *West* v. *Shuttleworth*. (2) In the last-mentioned case Lord Cottenham held that a gift for Masses was void on the ground that it constituted a superstitious use, but he also held that such a gift was not charitable, both on the ground that the gift was illegal, and therefore could not be charitable, and also because (I quote the words from page 698 of the report) "The intention was not to benefit the priests, or to support the chapels, but to secure a supposed benefit to the testatrix herself." In *Heath* v. *Chapman* (1) Sir Robert Kindersley followed *West* v. *Shuttleworth* (2), and held that gifts for Masses were void as constituting superstitious uses, and were also not charitable; but no argument appears to have been addressed to the question whether the gift was charitable or not.

The Vice-Chancellor referred to the words of the gift which were "'To the church of St. Mark, for masses for the soul of the testator, and for the poor dead,' . . . . The question on this is, whether the gift of saying masses for the souls of the poor dead makes the gift charitable? The usual test applied to try questions of this kind has been . . . . 43 Eliz. cap. 4. In that statute are enumerated a variety of uses which are charitable. Charitable uses are not exactly confined to those which are specifically expressed in the Act; but to be charitable uses they must be such as are there enumerated, or uses of an analogous character. Now, saying masses for the souls of the poor dead would have, I think, no analogy to any of those enumerated in the statute. Even if I were to take the construction of the words 'poor dead' to mean those who in life were poor, too indigent to provide for masses, even then that would not be a charity within the meaning of the statute; but if, as I am told, the words are used to refer to the condition of the souls after death, in purgatory, it is impossible to say that that bears the slightest analogy to any charity described in the statute."

(1) 2 Drew. 417.

(2) 2 Myl. & K. 684, 698.

It does not appear that there was any evidence as to the precise nature of the Masses, or as to the destination of the testamentary gift before the Court either in *West* v. *Shuttleworth* (1) or *Heath* v. *Chapman.* (2) In each case the decision on the question whether the gift was charitable or not was really a subsidiary one. The main decision was that the particular gifts were void as constituting superstitious uses.

In the present case there is no evidence before me as to the precise nature of the Mass, or as to the actual destination of the gift for the saying of the Masses. But counsel agreed to accept as applicable to the decision of this case the summary of the evidence of Dr. Delaney given in Ireland in the case of *Attorney-General* v. *Delaney* (3) as set out by the Lord Chancellor in Ireland in his judgment in *O'Hanlon* v. *Logue* (4), which is as follows: According to the doctrines of the Roman Catholic Church the Mass is a true and real sacrifice offered to God by the priest, not in his own person only, but in the name of the church whose minister he is. Every Mass, on whatever occasion used, is offered to God in the name of the church, to propitiate His anger, to return thanks for His benefits, and to bring down His blessings upon the whole world. Some portions of the Mass are invariable and some are variable. Amongst those invariable " are an offering of the Host by the priest for his own sins and for all present, and also for all faithful Christians both living and dead, and the sacrifice is offered for the church, and the granting to it of peace, and its preservation and union. It includes commemoration of the living and of the dead ; and he states that it is impossible, according to the doctrine of the church, that a Mass can be offered for the benefit of one or more individuals living or dead to the exclusion of the general objects included by the church. When an honorarium is given, for the purpose of saying a Mass for a departed soul, the priest is bound to say it with that intention, but that obligation may be discharged by a mental act of the priest, but it cannot be

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(1) 2 Myl. & K. 684, 698.

(2) 2 Drew. 417, 425.

(3) I. R. 10 C. L. 104.

(4) [1906] 1 I. R. 247.

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discharged by the ordinary parochial Mass which he says on Sundays and holy days. Such honoraria for Masses form a portion of the ordinary income and means of livelihood of priests, and are generally in Ireland distributed by those to whom the distribution is entrusted among priests whose circumstances are such that they stand in need of the assistance offered."

On that evidence, apart from the decisions in *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (2), could there be any real doubt but that a gift for Masses was charitable in the sense which is derived from 43 Elizabeth, cap. 4, because the object must necessarily be one which is not only for the public benefit, but for the advancement of religion, when one bears in mind, as one is bound to do, that the Court, in such cases, refuses to entertain an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals or contains nothing contrary to law. As the Lord Chancellor of Ireland pointed out in *O'Hanlon* v. *Logue* (3) "All religions are equal in the eye of the law . . . . whether the subject of this gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality." In *O'Hanlon* v. *Logue* (3) the Lord Chancellor, after summarising Dr. Delaney's evidence in *Attorney-General* v. *Delaney* (4), in the words I have already quoted, continued: "Such is the evidence as to the exact nature of the Mass, both generally and where a commemoration of named dead is included. It is settled by authority which binds us that, where there is a direction to celebrate the Mass in public, the gift is a valid charitable one; but what makes it charitable is the performance of an act of the church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation. Furthermore, adopting the evidence of Dr. Delaney, it seems

(1) 2 Myl. & K. 684, 698.

(2) 2 Drew. 417, 425.

(3) [1906] 1 I. R. 247, 260, 261.

(4) I. R. 10 C. L. 174.

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to me that the bequest of a sum of money for the saying of Masses, which cannot be satisfied by the ordinary parochial Mass, and the conferring of honoraria upon the priests who celebrate the Masses, are an endowment of the priest who celebrates this solemn sacrifice, and therefore an advancement of religion just as much as the erection of a church in which they might be said, or the endowment of an additional priest to celebrate them. Authority is not needed for the proposition that a gift for such a purpose would be a good charitable one." Then he mentions the two cases of *Powerscourt* v. *Powerscourt* (1) and *In re Lea, Lea* v. *Cooke.* (2)

In my judgment, once the true nature of the Mass is explained, and the destination and object of the payment for it is made clear, there can be no room for any other opinion but that a gift for Masses is charitable, and that the contrary view expressed in *West* v. *Shuttleworth* (3) and followed in *Heath* v. *Chapman* (4), is based upon insufficient and incorrect information with regard to the character of the rite, and the nature and purpose of the payment. In my view the decision in *West* v. *Shuttleworth* (3) that a gift for the saying of Masses is not a charitable gift is not correct, and is contrary to the whole current of authority with regard to gifts for the advancement of religion. The decision in *West* v. *Shuttleworth* (3) that such a gift was void as constituting a superstitious use was overruled by the House of Lords in *Bourne* v. *Keane* (5), and with it the decisions that followed it, including *Heath* v. *Chapman.* (4) *In re Blundell's Trusts* (6), *In re Fleetwood* (7) and *In re Elliott.* (8) Although there is no decision in *Bourne* v. *Keane* (5) on the question whether a gift for saying Masses is charitable or not, there are many passages in the speeches of Lord Birkenhead, Lord Atkinson, and Lord Parmoor, that recognise and support the view that such a gift is charitable. I have no hesitation in holding that a gift for the saying of Masses constitutes a valid charitable gift on the grounds,

(1) (1824) 1 Moll. 616.
(2) (1887) 34 Ch. D. 528.
(3) 2 Myl. & K. 684.
(4) 2 Drew. 417.
(5) [1919] A. C. 815.
(6) (1861) 30 Beav. 360.
(7) (1880) 15 Ch. D. 594.
(8) (1891) 39 W. R. 297.

first, that it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion, and, secondly, because it assists in the endowment of priests whose duty it is to perform that ritual act. On each of these grounds religion is advanced, and it is no objection in law that the particular religion advanced is a particular form of the Christian religion. In my judgment, *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (2) ought not to be followed. Indeed, I cannot help thinking that, if the substance of Dr. Delaney's evidence had been before the Court in both those cases the decision in each, so far as the point before me is concerned, would have been different.

In the result I hold that each of the gifts for the saying of Masses is a valid charitable gift. The gift in remainder to the parish of St. Peter's Roman Catholic Church is obviously valid.

Solicitors: *John B. Borer for Josiah Hincks, Leicester*; *Herbert Linley, the Treasury Solicitor.*

E. K. C.

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(1) 2 Myl. & K. 684.

(2) 2 Drew. 417.

PERROTT AND PERROTT, LIMITED *v.* STEPHENSON.

BENNETT J.

1933 Oct. 27.

[1933. P. No. 2312.]

Company—Directors—Governing directors—Powers under Articles to appoint additional directors—Construction—Unanimity.

The rule of corporation law that when a duty is delegated to a body of persons those persons can act at a meeting does not apply to the case of articles of association of companies incorporated under the Companies Act.

By Art. 90A of the articles of association of a company it was provided as follows: "the governing directors shall have power from time to time and at any time to appoint and remove at will additional directors and to define and limit their powers and duties provided that the total number of directors shall not exceed the prescribed maximum. Any director so appointed shall retire from office at the next general meeting, but shall be eligible for re-election subject to the approval of the governing directors. In all questions arising the opinion of the governing director or directors shall prevail."

Two out of the three governing directors of the company having, against the will of the third, by a resolution purported to appoint additional directors,

Held, that, on the construction of Art. 90A, the powers conferred on the governing directors by that article were to be exercised by all of them, and that the resolution was, therefore, invalid.

MOTION.

The plaintiff company sought by a motion which was treated as the trial of an action against certain directors of the company, (*a*) a declaration that a resolution purporting to have been passed by two of the three governing directors of the company on September 16, 1933, appointing two additional directors was invalid, of no effect and not binding on the plaintiff company; (*b*) a declaration that the two directors so appointed were not directors of the company; and (*c*) a declaration that in Art. 90A of the articles of association of the company the expression "the opinion of the governing director or directors" meant the unanimous opinion of all the governing directors for the time being or the opinion of a sole governing director.

The material articles were as follows:—

90A. The governing directors shall have power from time to time and at any time to appoint and remove at will

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additional directors and to define and limit their powers and duties provided that the total number of directors shall not exceed the prescribed maximum. Any director so appointed shall retire from office at the next general meeting, but shall be eligible for re-election subject to the approval of the governing directors. In all questions arising the opinion of the governing director or directors shall prevail.

114. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business, and until otherwise determined, two directors one of whom must be a governing director shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, at any time, summon a meeting of the directors.

117. A committee may elect a chairman of their meetings. If such a chairman is not elected, or if at any meeting he is not present within five minutes after the time appointed for holding the same, the members present shall choose one of their number to be chairman of the meeting.

Gavin Simonds K.C. and *J. B. Lindon* for the company. The words "the opinion of the governing directors or director" in Art. 90A imply unanimity. They do not empower two out of three governing directors to appoint additional directors.

Topham K.C. and *Vernon* for the defendants. In corporation law when a duty is delegated to a body of persons those persons can act at a meeting by a majority. They referred to Kidd on Corporations, vol. 1, p. 400; *Grindley* v. *Barker* (1), *Withnell* v. *Gartham* (2), *John Morley Building Co.* v. *Barras* (3), Buckley on the Companies Acts, p. 718, and Grant on Corporations, p. 68.

Gavin Simonds K.C. in reply referred to *In re London & Southern Counties Freehold Land Co.* (4)

(1) (1798) 1 Bos. & P. 229, 236.

(2) (1795) 6 T. R. 388, 398.

(3) [1891] 2 Ch. 386.

(4) (1885) 31 Ch. D. 223.

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BENNETT J. The question involved in this motion is whether on the construction of Art. 90A of the Articles of Association of the plaintiff company two of the three governing directors have the power against the will of the third to appoint additional directors. The question turns on the construction of that article and there are perhaps two other relevant articles. [His Lordship read Arts. 90A and 114.] Art. 114 is only important in so far as it enables me to contrast the language in it with that in Article 90A.

Upon the language of Art. 90A it seems to me reasonably plain that the words " governing directors " are not equivalent to " a majority of the governing directors." The defendants contend that to interpret the words " governing directors " as meaning " a majority of the governing directors " would be in accordance with the rule of corporation law said to have been laid down in Kidd on Corporations, and in *Grindley* v. *Barker* (1) and *Withnell* v. *Gartham* (2).

In my judgment the rule which has been laid down by the authorities on which Mr. Topham relies has no application to companies incorporated under the Companies Acts, but is applicable to cases where a corporation is entrusted with a duty of a public nature. That is reasonably clear from the judgment of Eyre C.J. in *Grindley* v. *Barker* (1), where he is contrasting powers of a general nature with those of a private nature. The rule of corporation law relied upon having in my judgment no application to the articles of this company, the question falls to be determined by the words of the articles, and contrasting the language of Art. 90A with that of Arts. 114 and 117, the conclusion to which I have come is that the powers conferred on the governing directors by Art. 90A are to be exercised by all of them. The plaintiffs are therefore entitled to declarations (1.), (2.) and (3.) as set out in the writ, and there will be liberty to apply.

Solicitors: *Tamplin & Co.*; *Kimbers, Williams & Co.*

J. L. D.

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(1) 1 Bos. & P. 229, 236.

(2) 6 T. R. 388.

C. A.

1933

Nov. 22.

In re W. D. J. (Deceased).

Lunacy—Receiver—Lunacy Percentage—Will—Discretionary Trust for benefit of Patient—Trust for Accumulation of surplus Income—Expiry of statutory Period of Accumulation—Subsequent surplus Income undisposed of—Patient sole next of kin—Right to claim increased Percentage after Death of Patient—Claim to Percentage on surplus Income accruing before appointment of Receiver—Claim to Percentage on Money applied under discretionary Trust for Maintenance of Patient after appointment of Receiver—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*d*)—*Rules in Lunacy,* 1892, *r.* 127.

The percentage payable in lunacy under the Rules in Lunacy, 1892, r. 127, on the annual income of property of a patient (being a person mentioned in s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890), which is "dealt with or made available" by any order in lunacy may be increased by a claim to percentage on additional income made after the death of the patient.

A statement to the contrary in Theobald on Lunacy, p. 489, disapproved.

Under the will of a testator who died in 1900, trustees were directed at their discretion to pay or apply the whole or any part of the income of residuary estate for the maintenance, clothing, comfort and benefit of a person in respect of whose property a receiver was appointed in 1925 under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890, and to accumulate the surplus income. Owing to the statutory period for accumulations having come to an end in 1921 the patient as sole next of kin of the testator was thereafter entitled to the surplus income; but the trustees invested and retained it until they were ordered by the order appointing the receiver to lodge the investments with the Paymaster-General. After the date of the order the trustees continued to apply part of the income of the residuary estate for the benefit of the patient under the discretionary trust, but paid the balance of the income to the receiver, who had been authorized by the order appointing him to give a discharge for all dividends, interest, and income of the patient, the patient having died on February 2, 1933:—

Held, that a percentage was payable under r. 127 of the Rules in Lunacy, 1892, in respect of (1.) the investments so lodged with the Paymaster-General and (2.) the sums applied by the trustees under the discretionary trust after the date of the order.

Appeal from the Master in Lunacy.

By his will dated September 17, 1897, George Henry Jackson after appointing executors and trustees thereof and making certain pecuniary bequests devised and bequeathed all his real and personal estate to his trustees upon trust for sale and conversion and after payment of an annuity as therein mentioned to invest the residue of his estate as therein mentioned. The testator then directed that until his son and only child (being the patient W. D. J.) should die or marry or become bankrupt or assign charge or incumber the income thereinafter provided for his benefit or any part thereof or do or suffer something whereby such income or some part thereof would by operation of law or otherwise if belonging absolutely to him have vested in some other person or persons "pay or apply the entire income of my residuary trust estate or such part thereof as my said trustees or trustee shall from time to time deem proper to or for the maintenance clothing comfort and benefit" of the patient with express power to the trustees to pay or apply for this purpose less than the entire annual income. On the cesser of this discretionary trust during the lifetime of the patient there was a similar discretionary trust for the benefit of the patient his wife and children and the testator directed the trustees during the life of the patient to accumulate all such portion of the income of his residuary trust estate as should not be paid or applied under the discretionary trusts by investing the same and the resulting income thereof as therein mentioned, all such accumulations to be added to the capital of the residuary trust estate. There was a gift over on the death of the patient as therein mentioned.

The testator died on December 31, 1900, and the will and two codicils which did not affect the trusts in favour of the patient were proved by the executors named in the will and codicils. The patient was the testator's heir at law and sole next of kin.

In accordance with the trusts, discretions and directions contained in the will the trustees applied so much of the income of the residuary trust estate as they thought proper to the support and maintenance of the patient and accumulated the surplus income. The statutory period for accumulations expired on December 31, 1921, but the then trustees overlooked this fact, and continued to accumulate and invest the surplus income until July 8, 1925.

On July 8, 1925, an order was made by the Master in Lunacy appointing Edgar T. Craven to be receiver in the matter of the patient under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890, and authorizing him in the name and on behalf of the patient to receive and give a discharge for all dividends interest and income and all arrears thereof respectively to which the patient was or might become entitled and allowed as from the date of the order the net income of the patient for his maintenance. The order also directed that lodgments were to be made and the funds to be dealt with as directed in the lodgment and payment schedules thereto. By the lodgment schedule the surviving trustees were directed to lodge with the Paymaster-General 438*l.* London Midland and Scottish 4 per cent. Debenture stock, 1375*l.* Local Loans 3 per cent. stock, and 400*l.* cash, being the accumulations of surplus income from December 31, 1921, to the date of the order. This was duly done.

After the date of the order the trustees continued to pay out of the income of the testator's residuary estate all expenses necessary for the patient's maintenance and personal comfort, and they paid the balance of the income to the receiver.

The receiver died on March 8, 1932, and a new receiver was appointed on June 23, 1932, who died on November 21, 1932. An application for the appointment of a third receiver was made before the Master in Lunacy on January 19, 1933, when a question as to the under-payment of the lunacy percentage was raised and the application adjourned. Before it came on again the patient died on February 2, 1933. He died a bachelor and left no will, and letters of administration to his estate were granted to F. B. Jackson and H. S. Craven on May 23, 1933.

Lunacy percentage was levied and paid upon all sums received by the successive receivers from the trustees from July 8, 1925, to June 23, 1932. On the application of the patient's administrators an order was made on April 11, 1933, directing the raising and carrying over to percentage account under 53 Vict. c. 5 and amending Acts the amount of percentage to be certified. On July 17, 1933, the amount to be carried over was certified by the Master in Lunacy to be 279*l.* 10*s.*, made up as follows: 232*l.*, being 3 per cent. on income applied by the trustees from the date of the order of July 8, 1925, to the date of the death of the second receiver ; 38*l*. 10*s*., being 3 per cent. on the investments and cash lodged with the Paymaster-General pursuant to the order of July 8, 1925, such investments and cash representing surplus income of the residuary trust estate of the testator after December 31, 1921 ; 9*l*., being 3 per cent. on income actually paid to the receiver in respect of the period from June 23, 1932, to November 21, 1932.

The patient's administrators appealed against the certificate except so far as regards the sum of 9*l*.

The appeal was adjourned into Court to be argued, and was heard on November 22, 1933.

W. A. Peck for the appellants. It is sought to levy a percentage on the funds paid into Court under the order of July 8, 1925, being invested accumulations of income received by the trustees of the testator's will after December 31, 1921, the date when the statutory period for accumulations came to an end, and on subsequent income applied by the trustees for the benefit of the patient. The claim to do this cannot now be maintained, because the patient is dead : see Theobald on Lunacy, p. 489, where he cites the case of *In re Alston* (1) as having decided that there was no legal right to recover percentage overpaid or to increase the assessment after the patient's death. It has not been possible to obtain any information as to that case beyond what is stated by Sir Henry Theobald.

[ROMER L.J. Do you say that if a patient dies the power to levy a percentage is gone, so that if a patient died just before the receiver brought in his first account no percentage could be levied ?]

The appellants' contention does not go as far as that, but there having been a levy of a percentage in the patient's lifetime, the levy cannot be increased or reduced subsequently. According to Sir Henry Theobald *In re Alston* (1) is an authority for that.

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(1) Unreported.

The whole question of lunacy percentage is governed by r. 127 of the Rules in Lunacy. (1) That rule provides for a percentage on income of a patient "dealt with or made available" by an order in lunacy. Here the investments brought into Court under the order of July 8, 1925, were not income of the patient but capital, and for this reason also no percentage is leviable in respect of them. These funds no doubt represented income received by the trustees and not applied for the maintenance and benefit of the patient, but the trustees, by treating this surplus income as capital and investing it, had converted it into capital before it was transferred to the receiver.

[Romer L.J. Surplus income retained by the trustees and invested by them after the power to accumulate ceased must still have remained the patient's income.]

The order is for the transfer of investments and not of income, and the investments are not therefore income of the patient within r. 127. The trustees had capitalized the surplus income although without authority to do so.

Further, no percentage is leviable on the income accruing after the date of the order of July 8, 1925, and applied by the trustees for the maintenance and benefit of the patient under the discretionary trust. None of this money was ever paid to the receiver, but the trustees applied it for maintenance, as it was obviously their duty to do. It is suggested that in this case the patient could have put an end to the discretionary trust because he was entitled to the benefit not only of income applied under the discretionary trust but also to the surplus income by reason of his being the sole next of kin of the testator. There are authorities which bear out this view: see *In re Smith* (2); and it is said that the receiver could therefore have required the whole income to be paid over to him. It may be that the trustees could have been compelled to do this, but in fact this course was never taken, and it is contended that a percentage cannot be levied on the income applied by the trustees which never passed into the possession of the receiver. The right to levy a percentage in regard to income applied under a discretionary trust apart from this special circumstance has never been decided: see Theobald on Lunacy, p. 485, where Sir Henry Theobald states: "Power is often given to trustees to apply all or any part of the income of a fund, at their discretion, for the benefit of a lunatic. Whether such income is subject to percentage came up for decision in the case of a lunatic not so found by inquisition, in which case, under Rule 127, clear yearly income dealt with or made available by the order is made subject to percentage. It was decided that income paid to the receiver by a trustee under such a discretionary trust for the benefit of the lunatic was income dealt with or made available by the order, and was therefore subject to percentage. Pascal Patterson, Warrington L.J., Feb. 21, 1917. . . . . If a trustee under the powers conferred upon him by his trust, himself applies income for the benefit of the lunatic, without paying it to the receiver, the income so applied is not dealt with or made available by the order, and is not subject to percentage, but this point has not been decided by the Judge."

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(1) Rule 127: "In the case of lunatics not so found by inquisition and of persons mentioned in section 116 (1) (*d*) of the Lunacy Act, 1890, with respect to whose property orders have been made under which income is from time to time dealt with or made available, there shall be paid a percentage at the rate of 2 per cent. per annum on the clear annual income amounting to 100*l*. and upwards so dealt with or made available; but so that no larger sum shall be payable in any case, in any one year, than 200*l*. . . . ."

(2) [1928] Ch. 915.

[Lord Hanworth M.R. Although the trustees have a discretion, why is not income that has once been applied for the benefit of the patient the patient's income?]

There is a distinction between money paid to the object of a discretionary trust and money which is laid out for his benefit in the provision of necessaries. That money cannot be said to have been dealt with or made available within r. 127.

Stafford Crossman for the Crown. As regards the last point raised this particular case is disposed of by the special fact that when once the trust for accumulation had ceased the patient as the testator's sole next of kin became entitled not only to the income applied for his benefit but to the whole income of the residuary estate. The order of July 8, 1925, making the patient's whole income available for his maintenance and enabling the receiver to give a discharge for it was therefore made at a time when the patient was entitled to the whole income either under the discretionary trust or as next of kin. The percentage must therefore be leviable on the income applied by the trustees for the benefit of the patient.

[He was stopped.]

Lord Hanworth M.R. This case appeared to raise an important point, and on that ground it was thought right to adjourn it into Court to be argued. That point was whether when a patient of whom charge has been taken by the appointment of a receiver under s. 116 of the Lunacy Act, 1890, is a beneficiary under a discretionary trust, the income applied by trustees for his benefit and advantage can be treated as dealt with or made available for him under an order within r. 127 of the Lunacy Rules. It is not easy to say that a sum which can be applied or withheld by trustees at their discretion is income dealt with or made available under an order in lunacy, for on such an order being made the trustees might refuse to exercise their discretion by applying it for the benefit of the patient. But that point does not really arise in the present case, and although we might be tempted to express our opinion on the point, it does not appear that the facts justify our doing so; and it would be mere obiter dictum.

The patient is the son and only child of a testator who made his will in 1897 and made provision in it for his son. The testator died on December 31, 1900, and the patient was his heir at law and sole next of kin. Under a discretionary trust contained in the will the trustees applied for the benefit of the patient so much of the income of the testator's residuary estate as they thought fit, and invested and accumulated the balance. The statutory period for accumulation expired on December 31, 1921, and thereafter there could be no proper accumulation; but as a matter of fact the trustees continued to accumulate so much of the income as was not applied for the benefit of the patient. Nearly four years afterwards an application was made to the Court, and on July 8, 1925, a receiver was appointed, and under the terms of the order the receiver was authorized to receive and give a discharge for all dividends interest and income and all arrears thereof to which the patient might become entitled. That order may or may not cover sums employed in the following way. The trustees did not pay over the whole income of the residuary estate to the receiver under the discretionary trust but applied sums out of the income from time to time in their hands to the patient's advantage. It is now suggested with regard to these sums that they fall within r. 127 of the Lunacy Rules, and that the lunacy percentage is chargeable in respect of them. As I have said, that might or might not be so in regard to money applied by the trustees under their discretion in the ordinary case of a discretionary trust, and the form of the order of July 8, 1925, would not assist the determination of the point, as it only gives the receiver power to receive and give a discharge for sums to which the patient may become entitled. But in the present case, if and so far as the income available for the exercise of the discretionary trust is not devoted to the patient's benefit it is undisposed of under the trusts declared concerning the testator's residuary estate, and must therefore pass to the patient as sole next of kin. It is a matter which cannot be denied that this income, if not devoted to the maintenance and benefit of the patient under the discretion of the trustees to which it is subject, must in so far as it is not so applied belong to the patient as sole next of kin. For that reason it is clear that the part of the income applied for the benefit of the patient falls within r. 127.

It may be unsatisfactory that we are only able to decide this case on its own particular facts, but it would be unfortunate if we went beyond them in giving judgment, for any decision we gave that did not arise on the facts could be criticized as unnecessary to a decision as to the distribution of the income and its liability to the percentage.

This case does, however, enable us to say that we are clearly of opinion that a point of this sort is not concluded by the death of the patient. In the present case the patient died in February, 1933, and all power in lunacy over his estate then ceased; but one of the matters remaining to be adjusted was the liability of the patient's income to percentage under r.127, and his estate, which is now being administered by two administrators, is liable to pay whatever is the right sum to be paid in respect of the liability which was not yet reduced into money value at the death of the patient, but can be so reduced even though the patient is dead. It is the duty of the administrators to deal with any liability of the estate, and the liability for this percentage was not therefore brought to an end by the patient's death.

The appeal therefore fails, but it has given rise to a useful decision, if only on this latter point.

ROMER L.J. It is in my opinion clear that as from the expiration of twenty-one years from the death of the testator the whole of the net income of his residuary estate received by his trustees was income to which the patient was entitled, because after 1921 he could at any moment have insisted on the whole income being handed to him, and the receiver after his appointment could have done the same. That I think is the effect of the authorities I had to consider in *In re Smith* (1) and the effect also of my decision in that case. Unfortunately therefore the point which Sir Henry Theobald in his book on lunacy says is a point which has not been decided by any judge must still remain undecided.

I have nothing to add to what the Master of the Rolls said on the rest of the case except in regard to an argument by Mr. Peck that percentage did not become leviable on the arrears of unapplied income between 1921 and 1925 that were transferred to the receiver under the order. His contention is that they had ceased to be income and become capital by reason of their investment by the trustees. I cannot take that view. It was surplus income belonging to the patient which the trustees invested. If the patient had received it and invested it, it might have been said that he had capitalized it; but as the investment was made by the trustees on their own initiative, what was income remained income and therefore

(1) [1928] Ch. 915.

income dealt with and made available under r. 127 so as to be liable to the percentage.

Appeal dismissed.

Solicitors: *Sandilands & Co.*; *Treasury Solicitor.*

H. C. G.

FARWELL J.
1933
July 5.

In re BEECHAM'S SETTLEMENT.

JOHNSON *v.* BEECHAM.

[1933. B. 2007.]

Administration—Trust—Covenant to pay Annuity—Annuity in arrears—Bankruptcy of Covenantor—Proof in Bankruptcy—Apportionment of dividend.

The covenantor by deed covenanted to pay an annuity to trustees for the benefit of his son, and, in certain events, for the benefit of other persons. The covenantor became bankrupt and the trustees lodged proof for the amount of arrears of annuity together with a sum which represented the capitalized value of the annuity. Proof was admitted for a smaller sum and a dividend declared and paid. The question was whether the whole of the dividend was payable to the annuitant and if not how it was to be apportioned.

Held, that the dividend must be apportioned in the ratio which the arrears of annuity bore to the total proof lodged. The portion representing arrears should be paid to the annuitant and the balance invested in the purchase of an annuity to be administered by the trustees in accordance with the trusts declared in the deed.

In re Sinclair [1897] 1 Ch. 921 distinguished.

ADJOURNED SUMMONS.

By a deed dated June 12, 1925, Sir Thomas Beecham covenanted with the plaintiffs, as trustees, to pay an annuity of 300*l.* for the benefit of his second son, Thomas Beecham. He also covenanted to pay a further 200*l.* a year so long as the son was being educated at a university. The conditions governing the payment of the annuity were as follows: "2. (*a*) The trustees shall until the infant attains the age of twenty-three years pay or apply all moneys received by them under the aforesaid covenants (or such parts thereof respectively as they shall from time to time think fit) for or towards the maintenance education or benefit of the infant in such manner as the trustees shall think best suited to fit the infant for a professional or business career or if the infant shall become a ward of Court then as the Court shall direct. (*b*) From and after the date when the infant attains the age of twenty-three years the trustees shall pay all moneys received by them under the aforesaid covenants as and when received to the infant during the remainder of his life or until some event shall happen whereby the said moneys or some part thereof if belonging absolutely to the infant will be or become vested in or charged in favour of some other person or persons or corporation but so that the trustees shall not be liable for paying the same to him or permitting him to receive the same after the failure or determination of the trust in his favour unless and until they have received express notice of some such act or event as aforesaid. (*c*) On the happening of any such event as last mentioned the trustees shall during the remainder of the infant's life, pay or apply all or any part of the said covenanted sums to or for the personal support or benefit of any one or more of the following persons—namely, the infant and his wife and issue (if any) for the time being in existence and any blood relations or connections by marriage of his for the time being in existence in such shares and manner as the trustees shall from time to time in their absolute discretion think fit."

There was a further condition regarding accumulations during the minority of the infant.

The agreement in fact was not acted upon, and no payments were made thereunder. On December 5, 1930, a receiving order was made against Sir Thomas Beecham, the covenantor. In August, 1932, a scheme of arrangement for rescinding the order was put forward and in these proceedings the trustees lodged proof for 7728*l.* 16*s.* 4*d.* of which 1630*l.* 1*s.* 4*d.* represented arrears of annuity and the balance, 6098*l.* 15*s.* the estimated value of the annuity of 300*l.* after the infant attained the age of twenty-one years, calculated and based on the Post Office annuity table. With the consent of the beneficiary, the proof was admitted for 5000*l.* and a dividend was declared of 10*s.* in the £. In accordance with the composition, the plaintiffs, as trustees, received a cheque for 2500*l.* on September 30, 1932. The money was placed on deposit and the questions for the determination of the Court were: (1.) Whether Thomas Beecham, the beneficiary, was entitled to the whole of the 2500*l.*; (2.) If only entitled to a part, how the balance was to be disposed of.

C. R. R. Romer for the plaintiffs, trustees.

Cleveland-Stevens K.C. and *Hewins* for the first defendant, Thomas Beecham.—In the cases relating to annuities given by will, the established rule is that where there is a deficiency a value is put on the annuity and this value will abate rateably —*Carr* v. *Ingleby.* (1) But there is no analogy between annuities under a will and annuities under a covenant—see *In re Sinclair; Allen* v. *Sinclair* (2), on which we rely, and where *Carr* v. *Ingleby* (1) was not followed. As regards the arrears, the amount of the annuity due to date must be paid in any case—*In re Dempster; Borthwick* v. *Lovell.* (3)

Morton K.C. and *G. P. Slade* for the other defendants.—The whole amount in the hands of the trustees should not be given to Thomas Beecham. The trustees were creditors and hold the money. The trust is to pay an annuity, and Thomas Beecham is not the only beneficiary, as, in certain events, other persons may become entitled. Moreover, there is a resulting trust of accumulations of unexpended income under the deed. This case therefore differs from *In re Sinclair; Allen* v. *Sinclair.* (2)

FARWELL J. This summons raises a question as to what, in the events which have happened, is the destination of a sum of 2500*l.* which the trustees of the settlement in question now have in their hands. The question arises in this way: [His Lordship stated the facts and quoted the relevant clauses of

(1) (1831) 1 De G. & Sm. 362.
(2) [1897] 1 Ch. 921.
(3) [1915] 1 Ch. 795.

the deed and continued :] It must be remembered that of the total sum of 7728*l.* 16*s.* 4*d.* for which a proof was lodged 6098*l.* 15*s.* was the estimated value of an annuity of 300*l.* terminable only upon the death of the annuitant and not at any earlier date. Proof having been lodged, the trustee in bankruptcy raised some question of the possible invalidity of the settlement, the grounds of which I need not discuss. The question, however, was raised, and a compromise was arrived at between the trustees and the trustee in bankruptcy, under which the proof was admitted at the sum of 5000*l.* The result of the bankruptcy proceedings was that the creditors were paid 10*s.* in the £ and the trustees accordingly received 2500*l.* in respect of this proof, and it is that sum which they now have in their hands ; and they ask the Court to determine in what way they ought to deal with it, it representing the total amount in the events which have happened, payable under the covenants of the settlement. In other words they have a capital sum representing partly arrears of the annuity and partly the capital value of the future payments under the covenants, and the question is how ought they to deal with it. On behalf of the son, Mr. Thomas Beecham, it is said that the whole 2500*l.* is his property, and the money ought to be paid over to him. On the other hand, it is said that that is not the way to deal with the matter, because the son is not the only person who has any interest under the trusts, since there are persons who might benefit in the event of a forfeiture, and it is pointed out that if a forfeiture did take place the annuity would not cease to be payable, and the covenant would be none the less enforceable ; the trustees would have to apply the income which they received if they enforced the covenant in the way directed by the settlement, or, in the event of their not so applying it, there would be, presumably, a resulting trust in favour of the settlor ; but in any case the annuity would still be payable although there would be persons other than the original annuitant, the son, to whom the annual sums might be paid. In those circumstances it is said that it would not be right for the trustees to hand over the whole of the 2500*l.* to the annuitant.

Certain authorities have been referred to, but most of them are cases where annuities are given by will, and it is possible that in those cases somewhat different considerations may apply. The case which is in many ways nearest to the present case is a decision of Kekewich J. in *In re Sinclair ; Allen* v. *Sinclair.* (1) In that case an annuity was secured to a person for life or until he forfeited it. It was secured by deed. Under the covenants, there was no provision made as to the continuance of the annuity after the forfeiture ; accordingly the annuity was not an annuity during the whole life of the annuitant, but was an annuity which might be determined at an earlier period. In that respect it differs entirely from the present case, where there is an annuity given for the whole life of the annuitant, with a provision that on a forfeiture other persons come in as objects of a discretionary trust. In the case before Kekewich J. the estate of the covenantor became insufficient to pay the annuity in full and in an administration action the annuity was valued and was represented by a fund in Court. Kekewich J. held that the whole of the fund ought to be paid to the annuitant. I think that the true explanation of that decision is that which was given by Sargant J. in *In re Dempster* ; *Borthwick* v. *Lovell.* (2) The learned judge there points out that the annuity in the case of *In re Sinclair* ; *Allen* v. *Sinclair* (1) was an annuity which might be determined earlier than the death of the annuitant, but there being no way of obtaining any appropriate valuation of such an annuity, it was treated and valued as though it were an annuity for the whole life of the annuitant, and on that footing the annuitant was entitled to be paid the capital value since no other person had any interest at all in the fund. That does not seem to me to apply in this case, because here the annuity is an annuity for the whole life of Thomas Beecham, the son, but there are other persons who may become interested in it in due course. It seems to me that I have to consider in what way the trustees in this case ought to deal with the money in their hands, having regard to the rights, or the possible rights, of all the persons who may benefit under the settlement. Here the covenant is with the trustees and it was the trustees who proved in the bankruptcy; it is the trustees who have the money in hand, and it is for them to apply it in such a way as is right and just, having regard to the considerations which I have mentioned. The annuitant has not received any part of the annual sums which were covenanted to be paid to the trustee up to the present time. He attained the age of twenty-three last year, but nothing at all was ever paid to the trustees by the covenantor, so that they were not in a position to pay over any sums to him, or to apply any sums for his benefit. If the annuity had been duly paid to the trustees and any part thereof not applied by them for his benefit, the surplus would have been accumulated and have become his property on his attaining twenty-three. It is to be noticed that there is a curious omission in the settlement inasmuch as whereas the trustees are directed to maintain the infant out of the annuity until twenty-three, and to accumulate any surplus during the minority of the infant, there is no provision for accumulation of any surplus during the period after the infant attains twenty-one and before he attained twenty-three. But in the events which have happened I think that I am entitled to disregard that in considering how this sum ought to be apportioned. I am quite satisfied that it would not be right in this case for me to direct the trustees to pay over the whole 2500*l.* to the annuitant. To do so would be to disregard some of the trusts which have been created by this document, and in that respect this case seems to me quite different from the case decided by Kekewich J., where there was no one who had any interest in the annuity except the annuitant, although the annuity itself might have been terminated at a time prior to his death. Here there are other persons who might become interested, and to direct the trustees to hand over the 2500*l.* to the son would, in my judgment, be to defeat altogether the possible benefits which some one or more of the discretionary class might otherwise have obtained, and entirely prevent the trustees doing what they are directed to do, namely, exercise their discretion in favour of a class in the event of a forfeiture.

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(1) [1897] 1 Ch. 921.

(2) [1915] 1 Ch. 795 at p. 800.

That being so, how ought this fund be dealt with ? The annuitant is clearly entitled to be recouped to some extent for the period during which he has not received any of the payments which he ought to have received under this deed. It is said that he ought to be paid in full at the rate of 300*l.* a year for every year until he attained twenty-three, and that the sum of 2500*l.* should be applied first in paying him such a sum as represents 300*l.* a year from the date of the annuity becoming payable until he attained the age of twenty-three. In my judgment that is not the right course to adopt. I have to see what the sum of 2500*l.*, which has been recovered by the trustees, represents. If the whole sum of 7728*l.*, which was the amount for which the proof was lodged, had been paid, of that sum 1630*l.* 1*s.* 4*d.*, the amount of the arrears, would have been payable to the son ; but instead of the 7728*l.* being paid, the sum of 2500*l.* was paid, and accordingly it appears to me that the sum which the son is entitled now to receive is that proportion of the 2500*l.* which the sum of 1630*l.* 1*s.* 4*d.* bears to 7728*l.* 16*s.* 4*d.*

With regard to the balance of the 2500*l.*, in my judgment the proper course for the trustees to adopt is to purchase an annuity with that amount, and during the remainder of the life of the son pay to him the annuity unless and until there is a forfeiture, and if and when there is a forfeiture, then to apply the annuity under the discretionary trust given to the trustees in the settlement. In that way effect will be given, as nearly as it can be, having regard to all the circumstances, to the trusts which have been declared, and if I were to adopt any other course I should be giving the go-by to the express provisions of the settlement.

Solicitors for plaintiffs : *A. C. Warwick & Co.*
Solicitors for Thomas Beecham : *Nicholson, Graham & Jones.*
Solicitors for other defendants : *W. R. Bennett & Co.*

R. A. Y.

FARWELL J.

1933

Oct. 19, 20, 23, 24.

TODRICK *v.* WESTERN NATIONAL OMNIBUS COMPANY, LIMITED.

[1932. T. 838.]

Easement—Right of Way—Contiguity to dominant Tenement necessary—Contiguity must be effective—Excessive User.

Where an easement consists of a right of way not only must it be appurtenant to and for the benefit of the dominant tenement but also it must be contiguous and give direct access to the dominant tenement. Further, in judging whether there is an excessive user of the right regard must be had to "the circumstances of the case, the situation of the parties and the situation of the land."

Ackroyd v. *Smith* (1850) 10 C. B. 164 discussed.

Thorpe v. *Brumfitt* (1873) L. R. 8 Ch. 650 and *United Land Co.* v. *Great Eastern Ry. Co.* (1875) L. R. 10 Ch. 586 applied.

WITNESS ACTION.

The plaintiff was the owner of a house known as "Skidden House" in St. Ives, Cornwall. To the south of the house was a roadway leading from the west from a highway (Skidden Hill) to garages at the eastern end. These garages and a property on the south of the roadway known as "Penwyn," The Terrace, St. Ives, had belonged to a Dr. Nicholls. Dr. Nicholls also owned property to the east of "Penwyn," hereinafter described as the "blue-land." In 1921 Dr. Nicholls sold "Penwyn" and the garages to a Mrs. Ralfe, reserving to himself and his successors a perpetual right of way along the roadway aforesaid with power to extend it on to the blue-land. The reservation was in the following terms: "Excepting and reserving in fee simple unto the Vendor his heirs and assigns owner or owners from time to time of all or any part of the Vendor's said adjoining property on the east of the said hereditaments (coloured blue on the said plan attached to these presents) and all persons going to or from any part of the last mentioned property a perpetual right of way in common with the Purchaser her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the said plan between the points marked 'A' and 'B' on the said plan and the right to construct an extension of such road or way between the points marked 'B' and 'C' on the said plan subject nevertheless to the payment by the Vendor to the Purchaser as from the making by the Vendor of such extension of the said road or way of a fair proportion of the expense of maintaining and keeping the whole of the road and the entrance gates thereof between the points marked 'A' and 'C' in repair." At the date of the conveyance October 15, 1921, the above roadway was some 35 yards in length and was not made up beyond the garages, which were on the north side of it. If extended for five or six yards it would have impinged directly on to the blue-land. Dr. Nicholls subsequently bought some land north of his blue-land and by a deed dated March 22, 1926, made between Mrs. Ralfe and himself the right to extend the roadway on to the north-land was substituted for the original right reserved by the deed of October, 1921. The result of the change was that the proposed extension would never touch the blue-land effectively but would pass over a strip which was closed at its eastern end by a wall some 6 feet in height. East again of this wall there was a sharp declivity of the land and a sharp rise still further east, in other words there was what can be described as a deep, sharp depression or gully east of the wall. In 1927 Mrs. Ralfe died, and the plaintiff, Dr. Todrick, purchased the garages and the roadway from her trustees subject to the existing right of way. The defendant company in 1930 acquired all the blue-land and the land north of it from Dr. Nicholls for the purpose of building a garage for their omnibuses. This garage was of special design: the roof was made to form a departure station for their vehicles, being accessible from a highway, The Terrace, on the south. To use the garage the omnibuses had to come by the roadway from Skidden Hill past the plaintiff's garages, but as a simple extension of the roadway eastwards would give a difficult means of access, they built the approach on a ramp which overtopped the wall (already mentioned) at

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TODRICK v. WESTERN NATIONAL OMNIBUS Co.

the eastern end of the roadway. The plaintiff objected strongly to the making of this approach, which made the driving of cars in and out of his own garages more difficult. The defendant company, however, completed their work, and the plaintiff brought the present action to assert his rights. He contended that the defendants had no right of way at all along the roadway, for the reason that the right alleged to have been given pertained only to the " blue-land " and not to the land north of it. Alternatively if such right existed, there had been an excessive user of that right which should be restrained. He also made a claim for damage to his property caused while the work was in progress.

The defendants averred that the conveyance to them of the lands included the user of the right of way and the power to extend the same on to their property, and that the user to which it was to be put would not be excessive. As regards the alleged damage they paid 10*l.* into Court as being a sufficient discharge.

Evershed K.C. and *Greenland* for the plaintiff. This case concerns an alleged right of way. Three questions arise: first, whether on the construction of the grant any right of way exists; second, whether there can be any easement not serving the dominant tenement; and third, if there is an easement, there has been an excessive user of that right. On the first question we submit that the document is only capable of the interpretation that the grant was intended to be annexed to the " blue-land " and no other. The second question, on which there is no direct authority, is the most substantial. Here we have an alleged right of way over a piece of land which does not lead directly and necessarily to the dominant tenement, and in my submission there is no easement at all but merely a personal licence and not assignable. The case is covered by the principles in *Ackroyd* v. *Smith* (1), where a right of way did not touch land which was made the dominant tenement. There it was held that the easement must be appurtenant to and for the benefit of the dominant tenement. Two other cases may be of assistance to your Lordship on this part of the case. In *Thorpe* v. *Brumfitt* (1) the right of way led to a small triangular piece of land which was conveyed by the defendants to the plaintiff, who thereby had a better use of his yard to which the land was contiguous. The Court was able to hold on the construction of the grant that the land conveyed was part of the yard and that the right of way led to the yard and not merely to the intervening triangular plot. In *Callard* v. *Beeney* (2) a farm of seventy acres was conveyed including a field No. 169 with a right of way over field No. 171 belonging to the vendors. The Court held that the dominant tenement was the whole farm and not merely field No. 169. In my submission the original grant was made appurtenant to the blue-land only, and as that land did not impinge at all in our view and only to a trifling extent even in the defendants' view on the right of way, we have an attempt to grant a right of way appurtenant to land to which it does not lead or to which it may not lead and is a right in gross.

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(1) 10 C. B. 164.

[They referred also to Gale on Easements, 11th ed., p. 19, and Theobald's Law of Land, 1902 ed., p. 157.]

As regards the excessive user the making of the ramp speaks for itself. The only right given was the right to extend the existing roadway. Moreover the roadway was not fit for anything but light traffic, and it was never contemplated that it should be used for heavy omnibuses. The mere fact that the user to which a right of way is put was never contemplated is not of itself conclusive, but in my submission the user must be reasonable. I would refer your Lordship to *Newcomen* v. *Coulson* (3); *Bidder* v. *North Staffordshire Ry. Co.* (4); and *White* v. *Grand Hotel, Eastbourne, Ld.* (5)

Daynes K.C. and *P. J. Sykes* for the defendants. It is not right to say that you must have physical contiguity between the servient and dominant tenement, none of the cases go as far as that. *Ackroyd* v. *Smith* (6) was dealt with on a demurrer, and the question was whether the pleadings were right. The demurrer is set out at the bottom of p. 172 and the terms of the grant at p. 177. That case is not very easy to understand.

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(1) L. R. 8 Ch. 650.
(2) [1930] 1 K. B. 353.
(3) (1877) 5 Ch. D. 133.
(4) (1878) 4 Q. B. D. 412.
(5) [1913] 1 Ch. 113.
(6) 10 C. B. 164.

[Farwell J. But it does say that the grant was an easement in gross.]

Daynes K.C. It says that an easement must be connected with the enjoyment or user of the land but there is no phrase in that case that requires physical contiguity to create an easement. [He referred to the judgments of Byles J. and Keating J. in *Bailey* v. *Stephens*. (1)] In the cases referred to by my learned friend, nowhere is it laid down that there must be physical contiguity. All that it is necessary to show is that the easement is connected with the useful enjoyment of the property. The deed of March 15, 1921, granted an effective right of way and the substituted right of way on March 22, 1926, could not derogate from that grant. The deed of March 22, 1926, created an easement of a right of way appurtenant to the blue-land. On the other part of the case it has been suggested that the grant did not include the right to pass heavy motor vehicles over the roadway, but the grant of a right of way over country is essentially a grant of a right to make the right of way effective: *United Land Co.* v. *Great Eastern Ry. Co.* (2)

Greenland in reply.

Oct. 24. Farwell J. The plaintiff is the owner in fee simple of a house known as "Skidden House" in St. Ives in the County of Cornwall and of certain land adjoining that house. Included in the land so owned to the south of the house there is a roadway over which the defendants claim to have a right of way, and this action is concerned with the defendants' alleged rights over it. The roadway is of some 35 or 40 yards in length; it leads at the western end out of a highway in St. Ives where there is a gateway with stone pillars on each side and gates which open. The width of the opening at the gateway itself when the gates are opened is 7 feet 9 inches, but the roadway is wider, being 9 feet in width for the most part.

(1) (1862) 12 C. B. (N. S.) 91.

(2) L. R. 10 Ch. 586.

From the western end it runs approximately east, and is now of some 40 or 41 yards in length. At the time when the plaintiff acquired his property the roadway had not been made up for the last 5 or 6 yards but terminated about 35 yards from the gateway, and was used almost exclusively by the plaintiff himself and his wife for the purpose of getting to two garages which belong to the plaintiff and are situated on the north side of the roadway at or near the eastern end as it then was made up. The garages are considerably below the level of the roadway, there being a sharp slope down from the roadway to them. These two garages are used by the plaintiff and his wife to garage their own cars, and at some time or other a portion of the ground immediately adjoining the roadway was concreted and has been used by the plaintiff for the purpose of washing motor-cars. Beyond the most easterly garage there would appear to be sufficient level ground to erect another garage if the plaintiff was so minded. When the plaintiff bought the property the roadway did not extend beyond, or very little beyond, the eastern end of the most easterly garage ; and beyond that, for a space of some 5 yards, there was no roadway ; the ground was extremely rocky and it was bounded at the eastern end by a stone wall. Running parallel with the roadway on the northern side there is another stone wall which operates as a retaining wall for the road itself and is the wall of the plaintiff's garden. That wall runs from the gateway at the western end parallel with the roadway nearly up to the first garage and then turns north and joins on to the garage. The ground on the south side of the roadway rises steeply and is somewhat rocky and no doubt some part of the bed is rocky. The road has never been actually metalled or made up ; it is somewhat of the nature of a country road, but it has been used, and is still being used, by the plaintiff for the purpose of taking his motor-car along it and is quite capable of being used for that purpose.

The property when the plaintiff bought it appeared from the title deeds to be subject to a right in the owner of the land immediately to the south-east of the roadway to use the roadway, putting it quite shortly, for all purposes, and it is necessary to consider what the actual right was which was purported to be granted to the owners of the dominant tenement. The easement, if it be an easement, was created by a deed of October 15, 1921, made between Dr. Nicholls of the one part and a Mrs. Elizabeth Ralfe of the other part. Dr. Nicholls was the vendor and was the owner at that time of the land immediately to the south-east of land which he sold to Mrs. Ralfe, who was the predecessor of the plaintiff. This land of the vendor's was coloured blue on the plan annexed to this conveyance and has been referred to many times in this case as "the blue-land," and I propose so to refer to it. It appears from the plan that the northern boundary of the blue-land extended considerably north of the proposed exit of the right of way on to the blue-land, that is to say, the roadway as it was proposed to be made led directly on to the blue-land, the proposed opening being some little way south of the northern boundary of that land. The terms of the reservation of the right of way in the conveyance were as follows:—"in fee simple unto the vendor his heirs and assigns owner or owners from time to time of all or any part of the vendor's said adjoining property on the east of the said hereditaments (coloured blue on the said plan attached to these presents) and all persons going to or from any part of the last mentioned property a perpetual right of way in common with the purchaser her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the said plan between the points marked 'A' and 'B' on the said plan." The point marked "A" is the most westerly extremity of the road (the gateway from the public roadway), and "B" is the point approximately opposite to the eastern end of the more easterly of the two garages which I have already mentioned. The deed continues: "and the right to construct an extension of such road or way between the points marked 'B' and 'C' on the said plan"—the point "C" on the plan is a point upon the wall which at that time separated the land of the purchaser from the land of the vendor, that is to say, from the blue-land—"subject nevertheless to the payment by the vendor to the purchaser as from the making by the vendor of such extension of the said road or way of a fair proportion of the expense of maintaining and keeping the whole of the road and the entrance gates thereof between the points marked 'A' and 'C' in repair." I should say this, that anyone proceeding along the roadway from the west and going as far as the wall which separates the plaintiff's land from the defendants' land would come when he got to the wall to a considerable drop, the defendants' land, which is the land on the eastern extremity of the right of way, being considerably below the level of the roadway. On the plan which is annexed to this conveyance the existing way is clearly shown and the proposed new way is also shown. That proposed new way is an extension in a south easterly direction of the existing roadway which was to lead down to and open directly upon the blue-land. Before, however, any extension of the roadway was made, an alteration was effected and that was done by a deed of March 22, 1926. The effect of that deed was this. The land which was immediately to the north of the blue-land was at that time the property of Dr. Nicholls, and for some reason the parties agreed that the right to make an extension of the existing roadway should be given as it had been before but that the direction of such new roadway should be altered. By the deed of March 22, 1926, the projection of the existing roadway was to be slightly to the north instead of to the south, and, as clearly shown on the plans which were attached to the document, the way then extended would lead directly to the land north of the blue-land and not on to the blue-land itself. I must qualify that by this. There has been a good deal of evidence called as to the exact point at which the new roadway ought to open. According to the defendants the roadway does impinge upon the blue-land to the extent of some three feet : on the other hand, according to the plaintiff's evidence, it does not impinge upon the blue-land at all. But whichever may be the true view (and that must depend upon the evidence which has been given as to the measurements to be found on these various plans) this is perfectly plain, that

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the roadway as provided for in the deed of March 22, 1926, for all practical purposes leads on to the land north of the blue-land and not on to the blue-land. If the defendants are right in saying that to the extent of some few feet it impinges upon the blue-land, then it may be possible for a person on foot, or even possibly on a bicycle, exercising great care, to avoid getting on to any other land than the blue-land when he leaves the roadway. But for all practical purposes, the only land to which the roadway leads is the land *north* of the blue-land, and it is not necessary for me to decide which of the various witnesses who have given their views as to these measurements is right, because, in my judgment, whichever be the right view, the result is the same; the roadway in question was intended to and does in fact open upon the land *north* of the blue-land and not upon the blue-land. That alteration having been made in the right to extend the roadway, nothing in fact was done and the roadway remained, until quite recently, in the condition in which it had been previously, that is to say, an effective road for some 35 yards with a bare, somewhat rocky space intervening between the easterly end and the wall dividing the blue-land and the land north of the blue-land from the plaintiff's property.

The plaintiff acquired his property in 1930 and he bought apparently subject to this right of way. The defendant company is a company whose business is, among other things, to own and run motor omnibuses, and they have a service of motor omnibuses in St. Ives and no doubt elsewhere. They have acquired the blue-land and the land north of the blue-land. The blue-land is oddly situated in that it rises steeply on the southern side and abuts on a public highway known as The Terrace, and there would appear to have been no way to get on to the blue-land except for foot passengers. There are steps leading from The Terrace on to the blue-land, but there were no means of getting horses or carts or other vehicles on to the blue-land except by the right of way. The defendants, having bought this piece of blue-land and the land north of it, desired to use it, as no doubt they were entitled to do, for the purpose of erecting a substantial garage. That garage has been erected. It is a building of somewhat unusual shape, and of such a height as to bring the roof upon a level with the roadway, The Terrace, and thus enables motor omnibuses to be taken from the roof directly to and from The Terrace, but the only method of approach to the garage itself is by the alleged right of way. The defendants use, or are proposing to use, the right of way, not for the purpose of taking their motor omnibuses along it when loaded with passengers, but for the purpose of taking their omnibuses to and from the garage on to the public highway, where they will take up passengers. In order to afford access to the garage it was necessary for the defendants to make up the roadway (the alleged right of way), which at that time did not extend to the boundary of their land, and for that purpose they built a roadway which rises sharply so that it goes over the wall which was the boundary between the land north of the blue-land and the plaintiff's land. That roadway is built up on a cemented ramp and is a solid construction, and it is no doubt from the point of view of the defendants a useful and desirable way of getting access to their own land for motor omnibuses. It was necessary to have not too steep a gradient so that motor omnibuses might be piloted safely up and down it, and that was effected by erecting this solid construction upon the plaintiff's property. The evidence with regard to the construction of that roadway and ramp comes to this ; no doubt if the defendants desired to make a roadway suitable for motor omnibuses, the method they have adopted was from their point of view a perfectly reasonable one. If the land on which the ramp stands had been their own land no one could have suggested that they had not adopted reasonable and proper means of getting the access which they required. On the other hand, the evidence does not satisfy me by any means that the only method of getting access from the roadway to the defendants' land was in the manner which the defendants have adopted. I am satisfied on the evidence before me that a way could have been made, not necessarily suitable for motor omnibuses, but a way suitable for ordinary vehicles which would not have entailed the erection of a permanent structure on the plaintiff's land. It might have been an expensive matter and one involving considerable alterations to the defendants' own land to provide a way by which a vehicle, having got to the boundary, could get safely down to the land of the defendants, but there is no evidence which would justify me in coming to the conclusion that the method adopted by the defendants was the only practical method of extending the roadway.

The defendants, having erected this ramp and made this roadway, are intending to use it for the purpose of having their motor omnibuses driven from the highway through the gateway along this roadway and up the ramp into the garage which is on the blue-land. As soon as the plaintiff became aware of what the defendants were doing and proposing to do he objected strongly, and he seems at first to have thought that the defendants had no rights over the land at all; but however that may be, he certainly strongly objected to what they were doing and it is not suggested and could not be suggested that what was done by the defendants was done with any consent on his part. The defendants, notwithstanding his objection, went on with the work. They have completed the ramp and there is now a roadway from the highway on to the defendants' blue-land. It runs along the original way and then turns on to the ramp and so up to the defendants' garage.

The plaintiff, being aggrieved by the action of the defendants, commenced this action and now seeks relief on three different grounds, and it will be necessary for me to consider them separately, but before doing so I should say this—the plaintiff has made complaint of certain specific things. He complains that the defendants have cut down a tree which he says was on his property and not on the right of way. He says that the rainwater runs down the roadway, gets into the wall, and is doing damage to it. There are also other comparatively small matters of which he complains, but I do not propose to deal with any of these matters in this judgment, for a reason which will appear later.

The three grounds on which the plaintiff relies in seeking to prevent the defendants doing what they are doing, are these:

First of all he says that the true effect of the two documents which purported to create this right of way was not to create an easement at all, but at most to create a personal licence in the grantee, a licence which would not pass with the land when it was sold, and that accordingly the defendants have never acquired any rights at all over the plaintiff's land; that any right which the original grantee acquired ceased when he parted with the land and from that time there has been no right in either the defendants or their predecessors in title over the land in question. Secondly he says, that if that be not the true view and if the defendants have a right of way over the roadway, then the use of it for the purpose of taking motor omnibuses to and fro upon it is an excessive user and one which is not authorized by the terms of the grant and that the defendants ought to be prevented by this Court from using the road for that purpose. Thirdly, and lastly, they say that if there was any right in the defendants to make an extension of the original way, that right was not exercised properly by the construction of the road which the defendants have chosen to construct, and that they ought therefore to be ordered to remove so much of the ramp and the roadway as is not constructed in accordance with the rights which they were given by these two deeds. Those are the three grounds on which the plaintiff seeks relief. I must examine them separately. The first, and of course in many ways the most important, is the question whether the defendants have got any right at all. If they have no right at all, then there is an end of the matter, because in that case in everything which they have done on the plaintiff's land they are and have been mere trespassers. It is not suggested that unless they can justify their entry upon the plaintiff's land under one or other or both of these two documents they had any right or have any right to enter upon it at all for any purpose. If therefore they have no right under these deeds, the action must necessarily succeed.

In considering whether these deeds or either of them do create an easement, it is necessary to bear in mind two things in connection with easements. First of all, an easement must be appurtenant to some definite land or property, and,

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secondly, it must be intended to be used and enjoyed in connection with the land to which it is appurtenant. The first of those two propositions cannot be disputed: it is well established that it is not possible to create an easement in gross: no such right or interest is known to our law, and any attempt to create an easement in gross can at most give no more than a personal licence to the grantee, which will not pass with the land as appurtenant to it on a conveyance. The second of these propositions is also not disputed, but it is said on behalf of the defendants that it does not follow from it in the case of a right of way that the way must lead directly on to the land to which it is appurtenant. Whether that be the right view or not is the real question on this part of the case. That an easement must be intended to be and must be in fact enjoyed and used in connection with the dominant tenement to which it is appurtenant cannot be doubted. If any authority is wanted for the proposition, it is to be found in the case of *Ackroyd* v. *Smith.* (1) That case, as in the case of many of the older authorities, is a little difficult to follow, as it turns to some extent on the old form of pleadings, but as I understand it it is an authority for the two propositions which I have stated; but while this is not disputed by the defendants it is said by them that there is nothing in *Ackroyd* v. *Smith* (1), nor in any of the other cases, which decides that it is necessary that a right of way should lead on to the dominant tenement or impinge upon it. It is said that there may be a right of way to and from a point not on the dominant tenement with an intervening space between that point and the dominant tenement but from which intervening space it is possible to gain access to the dominant tenement. It matters not, so it is said, that the only access to the dominant tenement from the servient tenement is over land other than that which comprises the dominant tenement. If this were right it would seem to follow that a right of way from A to B which did not afford access to the dominant tenement at all would yet be a good easement if it could be shown that by using the right of way some benefit accrued to the dominant tenement. It may, I think, be a matter of some

(1) 10 C. B. 164.

little doubt how far *Ackroyd* v. *Smith* (1) is a definite authority against this view. For my own part I think it is, but it may be that it does not go so far as definitely to determine that a right of way must be one which gives immediate access to the dominant tenement. But if *Ackroyd* v. *Smith* (1) does not establish that, in my judgment the later case of *Thorpe* v. *Brumfitt* (2) does. The facts in that case were these: a right of way had been granted as appurtenant to a certain yard to which it gave direct access; subsequently it was somewhat altered so that it did not lead directly to the yard but to a small portion of land which the owner of the yard had acquired immediately in front of and adjoining the yard, and the question was whether the fact that the right of way as altered led to this small portion of land outside the original yard and not to the yard directly prevented it being a good easement. The Court of Appeal held that it was a good easement on the ground that the little strip of land which the plaintiff, the owner of the yard, had acquired had been acquired as and was in fact a part and portion of the yard itself, and that accordingly the right of way was a properly granted easement, because it did lead on to the dominant tenement. As I understand the decision in that case, if it had not been possible to come to the conclusion that the intervening land was part of the yard and should be so treated, then the decision would have been the other way, and in my judgment it is an authority (which, of course, is binding upon me) that a right of way to be a good easement must be a way which affords direct access to the dominant tenement. Moreover, apart from authority it would seem that it must be so. If by going along the right of way the person using it does not get upon the land which forms the dominant tenement, then it is impossible, in my judgment, to say that the right of way is being used directly for the purpose of the dominant tenement or that it is being used for the benefit of the dominant tenement. It may be that the person so using the way when he gets upon the land to which it leads may be able to go from there to the dominant tenement, but in my judgment it cannot be said that the easement is being used and enjoyed in connection with the dominant tenement if it is in fact being used to gain access to some other land notwithstanding that by that means access may be obtained to the dominant tenement. If that be the true view of the matter, when one looks at the documents in this case the result, I think, is apparent. By the document which created the right of way originally, that is the deed of October 15, 1921, the right of way when the proposed extension had been made would have led directly from the public highway at the west end to the blue-land of the vendor at the east, and this easement was, in my judgment, by the express terms of the deed, made appurtenant to that land. If no alteration had ever been made, there would have been a right of way from the gates at the western end to the point on the blue-land which is indicated by the letter "C" on the plan attached to the conveyance of October 15, 1921, a good easement because it was made appurtenant to the blue-land to which it was intended to afford access, and it therefore satisfied both requirements. When the alteration in the right of way was made it was not any longer a right of way on to the blue-land; it was substantially, at any rate, a right of way on to the land to the north of the blue-land, and, in my judgment, it is quite impossible for me in this case to adopt the solution which the learned Lords Justices found themselves able to adopt in the case of *Thorpe* v. *Brumfitt* (1) and to say that the land to the north of the blue-land can be treated as part of the blue-land. That is clearly not so. There was, at any rate at one time, a definite fence between those two closes, and there is no possible ground in this case for saying that they ever were or were intended to be treated together as making up the blue-land. That being so, the result of the subsequent alteration of the way was this: the old easement, so far as the extension of the right of way is concerned, had been surrendered and had ceased to exist, and in lieu therefor a new easement was granted which was on the documents intended to be appurtenant to the blue-land, but which did not lead on to the blue-land at all. No doubt the explanation of this was that at the time of this new grant both the blue-land and the land north of it were in the same ownership, and as Mr. Nicholls told me in the witness-box, when they came to plot out the place where the extended right of way should terminate they did not trouble to get any very exact readings because, as both parcels of land belonged to the same party, it did not appear to them to be important, and similarly when the deed came to be drawn up, the importance of making clear in the deed itself what was the land to which the right of way was intended to be appurtenant was not, I think, appreciated and it was left, so that while it would seem from the language used that the right of way was intended to be appurtenant to the blue-land, the plan annexed to the document showed that it did not afford any means of direct access to that land. The result of that is that there is an attempt to create an easement which is not made appurtenant to any particular land, or, alternatively an easement which purports to be made appurtenant to land in connection with which it cannot be used and is not therefore a proper creation of an easement at all. That being so, the only effect of these two documents was to reserve to the vendor a personal licence, and when the vendor parted with the property the right to use the way came to an end, and consequently the plaintiff got his land free from any right of the defendants to enter upon it for any purpose, and they are mere trespassers. That, of course, disposes of the whole matter so far as I am concerned, but the case is one of considerable importance to the defendants, who may desire to appeal, and it would be therefore unsatisfactory to decide this action on that one ground without expressing any view upon the other two grounds, both of which have been very fully argued before me. I propose therefore to state quite shortly the conclusions to which I have come on the other two grounds. If, contrary to the view I have expressed, there was created and there is now a valid easement, then is the use of the right of way by the driving of motor omnibuses up and down it a proper use of it ? In that connection, great reliance has been placed by counsel for the defendants upon the case of *White* v. *Grand Hotel, Eastbourne, Ld.* (1) That was a case where there was a grant of a right of way, and at the time of the grant the house to which or from which the right of way led was a private dwelling-house. It was subsequently turned into an hotel, with the result that the way was very much more used than at the date of the grant. The plaintiff in that case tried to convince the Court that because the amount of user of the right of way was so much greater than anything that could have been anticipated when the grant was made it was an excessive user and one which he was entitled to have stopped. That view did not commend itself either to Joyce J., who tried the case, or to the Court of Appeal, and it was said that the mere fact that the use made of the right of way was greatly extended beyond anything which may have been in the contemplation of the parties at the time when the grant was made was no ground for saying that it was not a proper user. But in my judgment that case is quite a different case from the present one. In considering whether a particular use of a right of this kind is a proper use or not, I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land at the time when the grant was made: see *United Land Co.* v. *Great Eastern Ry. Co.*, per James L.J. (2); and in my judgment a grant for all purposes means for all purposes having regard to the considerations which I have already mentioned. It would be ridiculous to suppose that merely because the grant was expressed to be for all purposes it entitled the owner of the dominant tenement to attempt to use it for something for which obviously it could not be used. For instance, it seems to me that it would be impossible to suggest that the grantee of a right of way would be entitled to take down it, or attempt to take down it, vehicles which were so wide that they could not pass without breaking down the walls or otherwise destroying the plaintiff's property. It would obviously not have been in the contemplation of the parties when the grant was made that the way should be used for such a purpose, and therefore in my judgment a grant of this kind must be construed as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant. No one has suggested, and I do not think it could be suggested, that either of the parties at the time when this easement was purported to be granted had it in mind that motor omnibuses might be driven up and down it. But that is not enough in itself. The mere fact that the parties had not envisaged such a possibility is not alone ground for saying that it is an improper user of the way: all the relevant facts must be considered. What I have to consider is this: Here one has a roadway which may be described as somewhat like a short country lane. It is bounded by a wall which is a retaining wall and belongs to the plaintiff. One of the defendants' witnesses, Mr. Cane, whose complete confidence in his own opinion I am unable to share, was confident that the wall was amply sufficient to bear the weight of the motor omnibuses and that it would not be affected at all if the way were used by them. The experts on the other side did not share that view at all. They thought that the wall would suffer and suffer badly if vehicles of such a weight as motor omnibuses were driven frequently up and down it. Whatever else may be said, it is quite clear that when the wall was built it was not built with the idea of retaining a road used for such a purpose as that, and when I consider that this is a road to which the only entrance is 7 feet 9 inches wide, that the width of an omnibus is 7 feet 6 inches, leaving only 1½ inches clearance on each side, that the weight of an omnibus is at least three tons, that this is a road which is retained by a wall the strength of which is at least in doubt, when I take all those circumstances into consideration, I am unable to come to any conclusion but that a user of this roadway by motor omnibuses is not such a user as can be justified by the terms of the grant. It is not having regard to the circumstances of the case, the situation of the land and the situation of the parties at the time of the grant, such a user as could have been in the contemplation of either of the parties, and is not such a user as is proper in my judgment for a way of this kind. If, therefore, I had come to another conclusion on the first point, I should have thought it right to restrain the defendants from using this way for the purpose of driving motor omnibuses up and down it.

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(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

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(1) L. R. 8 Ch. 650.

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(1) [1913] 1 Ch. 113.

(2) L. R. 10 Ch. 586 at p. 590.

I will deal with the last point as shortly as possible—the question whether the erection of this ramp was a proper means of carrying out the right, if they had it, of extending the road. In my judgment that was not a proper exercise of that right. I cannot bring myself to think that a grantee of a right of way, even though in terms it includes a right to extend the existing right of way or to make the right of way, is entitled, except possibly in a case where there is no other method of making a way, to erect upon the servient tenement a permanent structure such as the defendants have erected on the land in this case. I have already intimated that in my judgment on the evidence before me it is not the fact that there was no other method of exercising the right. I am satisfied the way could have been extended without the erection of a permanent structure of this kind, and in my judgment such an erection is not within the power given to the defendants, and is in itself a trespass, and had it been necessary for me to do so, I should have thought it right to make a mandatory order upon the defendants to remove it. But in the view which I take of this case that appears to me to be an order which I cannot make. I have already come to the conclusion that the defendants are trespassers. I cannot, it seems to me, consistently with that view, order the defendants to continue their trespass by going upon the land and taking away the ramp, and in my judgment the relief to which the plaintiff is entitled is a declaration that the defendant company is not entitled to any right or rights of way over the drive, or any extension thereof, and an injunction to restrain the defendants from committing trespasses on the plaintiff's land, and an inquiry as to damages owing to the defendants' trespass. It is because I have come to that conclusion that I have not thought it necessary to go into the question of the alleged damage to the tree, and the other matters of that kind, because those are all matters which can be conveniently dealt with on the inquiry including the question as to the extent to which the ramp has caused any real injury to the plaintiff. The order that I propose to make, therefore, is to make the declaration I have intimated, to grant the plaintiff an injunction, to order an inquiry as to damages, and to order the defendants to pay the costs, but I shall order the 10*l.* which has been paid into Court to be paid out to the defendants.

[The defendants applied for a stay of execution, but on the plaintiff, by his counsel, undertaking not to interfere with the ramp for seven days after the order had been passed and entered, and if notice of appeal was given within that time until after the appeal had been heard, His Lordship refused a stay.]

Solicitors for the plaintiff: *Robbins, Olivey & Lake for Boase and Bennetts, Penzance.*

Solicitors for the defendants: *Clifford-Turner Hopton & Lawrence.*

R. A. Y.

In re SUTTON.

EVANS *v.* OLIVER.

[1833. S. No. 3467.]

LUXMOORE J.
1933
Dec. 6, 21.

Will—Bequest to statutory next of kin after Death of Wife—Date of Ascertainment—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 46, 50, *sub-s.* 2.

Residuary bequest upon trust "for such person or persons who at the decease of my wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my wife intestate."

The testator died on October 9, 1923, and his widow died on June 6, 1933. Between these dates the Administration of Estates Act, 1925, had come into operation, and by s. 46 new rules of intestate succession had been prescribed. By s. 50, sub-s. 2, trusts declared by a will coming into operation before the commencement of the Act by reference to the Statutes of Distribution "shall, unless the contrary thereby appears, be construed as referring to the enactments relating to the

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distribution of effects of intestates which were in force immediately before the commencement of this Act":—

Held, that the persons to take the residue were to be ascertained according to the law of distribution in force before the commencement of the Administration of Estates Act, 1925.

ADJOURNED SUMMONS.

Joseph Edward Sutton by his will dated March 13, 1923, appointed William David Roberts, John Bethell Sackville Evans, and William Mackenzie Haig executors and trustees thereof, and, after giving certain pecuniary and specific legacies free of duty, devised his freehold messuage "The Priory," West Hampstead, to his trustees upon trust to permit his wife Ellen Sutton to reside there during her life upon certain terms, and after the death of his wife or her ceasing to reside therein upon trust for sale, and to stand possessed of the proceeds of such sale upon the trusts and subject to the provisions affecting his residuary estate as declared by his will. The testator devised all his real estate and bequeathed all the personal estate of which he should die possessed, and which should not otherwise be disposed of by his will, upon trust to sell (subject to the power of postponement therein contained) and convert the same, and out of the proceeds to pay his debts death duties funeral and testamentary expenses and the legacies bequeathed thereby and the duty upon any legacy or annuity bequeathed free of duty, and to stand possessed of the residue thereof upon trust to purchase certain annuities and invest the residue of his estate upon any of the investments thereby authorized and to pay the income arising therefrom to his wife during her life for her separate use without power of anticipation, and subject thereto "In trust as to such residue and income for such person or persons (with the exception of my nephew Joseph Browning and his issue if any) who at the decease of my said wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my said wife intestate and domiciled in England, such persons if more than one to take in the portions prescribed by such statutes."

The testator gave certain directions to his trustees as to advertising in such leading newspapers of the United Kingdom and of Canada, Australia, New Zealand, and South Africa and of the United States as his trustees should select for one clear year, if any difficulty should arise as to ascertaining or tracing the person or persons entitled to a share of his residuary estate under the foregoing bequest thereof with a provision that at the end of such year his trustees might divide his residuary estate among the persons of whom they had knowledge or should have answered such advertisements and that any unknown or untraced person should be considered to have died in the testator's lifetime and not to be entitled to a share or shares of his residuary estate and directed that each of his trustees at the completion of the administration of his estate should receive an additional legacy of 300*l*.

The testator died on October 9, 1923, and his will was proved in the Principal Probate Registry on November 5, 1923, and his estate was duly administered so that the amount of the residuary estate could be ascertained. "The Priory," West Hampstead, mentioned in the will, was the only real estate of which the testator died possessed, and it was sold in September, 1929, and the proceeds of sale were added to the residuary estate, and the testator had no other real estate.

William David Roberts, one of the trustees, died on June 9, 1931, and William Mackenzie Haigh died on November 13, 1931. By deed dated November 19, 1931, Sidney Wood, Arthur Jack Sackville Evans, and William Charles Cox were appointed trustees of the testator's will jointly with the said John Bethell Sackville Evans.

The testator's widow died on June 6, 1933, having by her will, which was proved on August 17, 1933, appointed Lucretia Molnari, Daisy Hewett, George Marriott, Edgar and George Scott Jackson her executors.

At the death of the widow questions arose whether under the terms of the residuary bequest in the testator's will the next of kin of the testator between whom the residuary estate was to be divided were to be ascertained at the time of the testator's death or at the time of the death of his widow. Between these dates the Administration of Estates Act, 1925, had come into force whereby the devolution of the estates of intestates was altered. Some of the persons taking under the new law were different from those who would take if the old law applied. Many of the persons who would take under either of the laws were resident abroad and their residences were not known, so before issuing the prescribed advertisements the trustees issued this summons on September 26, 1933, to have this question decided among other questions arising under the will.

The defendants were Hannah Amelia Oliver, one of the persons entitled if the new law applied; James Francis Sutton, who would be entitled under the old law; and the personal representatives of Helen Catherine Sutton, the widow.

The question in the summons relating to this matter was as follows:—

1. Whether upon the true construction of the said will and in the event which has happened of the death of the testator's widow on June 6, 1933, the persons entitled to the residuary estate of the testator are the persons who were of the testator's blood and of kin to him if the testator had died on June 7, 1933, or alternatively on June 6, 1933, have been entitled to his personal estate (*a*) under the Statute of Distribution, 22 & 23 Car. 2, c. 10, or (*b*) under the Administration of Estates Act, 1925, and in the several shares and proportions to which such persons would be entitled under such statutes respectively.

By the Administration of Estates Act, 1925, s. 50, sub-s. 2: "Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act."

Meyrick Beebee for the plaintiffs.

Wilfrid Hunt for the persons who would be entitled under the new law. By s. 50, sub-s. 2, of the Administration of Estates Act, 1925, when there is any reference in a will coming into operation before the commencement of that Act to the Statutes of Distribution the law before the commencement of the 1925 Act shall apply unless the contrary intention appears in the will. First, I submit that there is not in this will a reference to the "Statutes of Distribution" as intended in the sub-section. The testator writes the word "distribution" with a small initial letter, and the phrase used does not refer to any particular statutes but to any statute which deals with the distribution of the estates of intestates. At the time when the testator made his will in 1923 the Law of Property Act, 1922, had been passed, and, although it never actually came into force, it was at the time the statute governing devolution. By s. 150 of that Act devolution of intestates' estates was in the same words as appear in s. 46 of the Administration of Estates Act, 1925. The Act 22 & 23 Charles 2, c. 10, by which down to 1886 the devolution of intestates' estates was governed has in the Short Titles Act, 1898, the short title of "The Statute of Distribution" and the words "Statutes of Distribution" have no statutory authority to refer to any particular statutes.

But, assuming that I am wrong in this, I submit that there is in this will a contrary intention expressed which takes it out of the sub-section. The testator does not leave his residuary estate to go to the persons who would be entitled according to any Statutes of Distribution, but he expressly excludes his nephew Joseph Browning and his issue. Now under the old law before 1926 the issue of a deceased nephew would not have taken and therefore the testator was not referring to the result of that law, but he must have had in mind the provisions of the Act of 1922. The decision of Eve J. in *In re Sutcliffe* (1) does not, I submit, apply to the present will.

Roxburgh K.C. and *C. A. J. Bonner* for the persons claiming

(1) [1929] 1 Ch. 123.

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under the old law. It is highly improbable that the testator knew of the Law of Property Act, 1922, or if he did that he intended to govern the distribution of his estate by s. 150 of that Act, which was not to come into force until 1925, and which in fact never came into force. That section applied to real as well as personal estate, and the testator in his will directed his real estate to pass as personal estate, which would have been unnecessary. We submit that there is no contrary intention expressed here that takes the case out of the sub-section, and the decision in *In re Sutcliffe* (1) applies to and governs this case. It is improbable that the testator would leave the ascertainment of his residuary legatees to be decided by some future definition which he could not anticipate.

Cur. adv. vult.

Dec. 21. LUXMOORE J. The testator by his will, dated March 13, 1923, devised all his real estate and bequeathed all his personal estate upon trust for sale, and, after providing for the payment of his debts funeral and testamentary expenses and legacies and the duty thereon, directed his trustees to purchase certain annuities, and to invest the residue of his estate, and to stand possessed of the investments upon trust to pay out of the income the expenses of the management of his estate, and to pay the residue of such income to his wife during her life. The will continued in these terms: "Subject thereto in trust as to such residue and income for such person or persons (with the exception of his nephew Joseph Browning and his issue if any) who at the decease of my said wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my said wife intestate and domiciled in England, such persons if more than one to take in the portions prescribed by the same statutes." The will contained a declaration that: "In case any part of my estate shall at the time of my death consist of freehold property the same shall as from the date of my death be deemed to be and shall pass as personal property."

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(1) [1929] 1 Ch. 123.

The testator died on October 9, 1923, and his widow died on June 6, 1933.

The question that arises for decision is, whether the persons to take under the residuary gift in favour of "such person or persons (with the exception of my nephew Joseph Browning and his issue, if any) who at the decease of my said wife shall be of my blood and of kin to me" are to be ascertained in accordance with the law as it stood before the Administration of Estates Act, 1925, came into operation, or in accordance with the law laid down by that Act.

By s. 50, sub-s. 1, of the Administration of Estates Act, 1925, it is provided that: "References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act." Sub-s. 2 provides: "Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act." It is therefore necessary in the case of a will coming into operation before the commencement of the Act, if the mode of distribution laid down by the Administration of Estates Act, 1925, is to apply, that there should be found in that will an expression of intention to that effect. The testator died before January 1, 1926, the date fixed for the coming into operation of the Administration of Estates Act, 1925. His wife died after that date.

Mr. Hunt, on behalf of the persons who are entitled if the distribution is to be governed by the Administration of Estates Act, 1925, argued that that Act applies because there is no reference in the will to the Statutes of Distribution within the meaning of s. 50 of that Act, and that there is therefore no need to consider whether there is any contrary intention expressed in the will. He argued that the phrase "Statutes for the Distribution of the Estates of Intestates" on its true construction is a reference, not to particular statutes in force at the date of the testator's death, but to the general statute law which may happen to be in force at the date of distribution. In support of his argument he pointed out that in the phrase used by the testator the word "distribution" is written with a small "d," and that the words "for the distribution of the personal estates of intestates" are descriptive of the objects of the statutes, and are more apt to describe the general law than to describe particular statutes or a particular statute which are or may be referred to as the "Statutes of Distribution." He placed reliance on the fact that in the Short Titles Act, 1896, the Act 22 & 23 Charles 2, chapter 10, which regulated the distribution of personal estate on an intestacy, had given to it the short title of "The Statute of Distribution." There is no other Act which has a similar short title given to it by statute, nor are the words "Statutes of Distribution" constituted a short title by the Short Titles Act or any other Act. It is to be observed that s. 50 of the Administration of Estates Act, 1925, refers not to the Statute of Distribution but to the Statutes of Distribution. As I have pointed out, this is not a statutory short title, although it is a well recognized phrase in common use at the date of the testator's will, and at the passing of the Administration of Estates Act for compendious reference to a number of statutes regulating the devolution and distribution of property upon an intestacy. The only difference between the words of the Act and the will is that the word "distribution" appears in the Act with a capital letter, while in the will it is written without a capital. The words in sub-s. 2 of s. 50: "The enactments . . . . relating to the distribution of effects of intestates" are, in their ordinary meaning, difficult to distinguish from the words in the will: "Statutes for the distribution of the personal estates of intestates." If you compare the wording of sub-s. 1 of s. 50 with that of sub-s. 2 of the same section it seems to me to be clear that "Statutes of Distribution" throughout the section are not used in any restricted sense, but with reference to all statutes regulating distribution on an intestacy.

It follows, in my opinion, that there is in this will sufficient reference to the Statutes of Distribution to bring into operation the provisions of sub-s. 2 of s. 50, and, this being so, the testator's will must be construed with reference to the law in force before January 1, 1926, unless there is to be found in the will a sufficient contrary intention; for the sub-section requires that, if the new law is to apply, you must find that contrary intention expressed.

Mr. Hunt argued that a contrary intention is to be found in this will, because the testator excludes from participation in the distribution not only his nephew Joseph Browning, but also the issue of that nephew, and he points out that under the old law there is no provision for the representation of a deceased nephew or niece by his or her surviving issue. I am unable to accept this contention for what must be considered is possibility and not probability. Under the old law the issue of a nephew or niece would take if no nephew or niece of the testator survived the period of ascertainment. For the old rule with regard to personalty was that if there were no children or remoter issue, no father or mother, or brothers or sisters, nephews or nieces, the intestate's property was divisible among such persons as were in the nearest degree of kindred.

Mr. Hunt also relied on the circumstance that at the date of the will, namely, March 15, 1923, the Law of Property Act, 1922, had been passed, and was to come into force according to its provisions on January 1, 1925. I do not think that much weight can be attached to this argument, for the will refers to the statutes for the distribution of personal estate. The Act of 1922 applied not only to

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personalty but also to realty, and the testator was possessed of property in each case. Moreover, it would be difficult to accept the view that the testator deliberately intended that the choice of the law to govern the distribution of his residue should depend on the chance whether his widow should die before or after January 1, 1925. There is no doubt that the testator wanted his property to go after his wife's death to a class of persons to be ascertained at that date, and to give effect to this desire words of futurity were necessary. In using as he did words of futurity it is of course possible that such words are wide enough to put into the future the ascertainment of the law applicable as well as the ascertainment of the class to take, but in the present case it is at least impossible to say that the use of words of futurity must of necessity cover the ascertainment of the law as well as the ascertainment of the class, and the argument cannot be put higher than this, there must always be ambiguity as to the intention. If there is ambiguity it is impossible to find a positive contrary intention in the will. Further, the presence in the will of the reference to "personal estates" suggests that the testator had in mind the old law, for both the Acts of 1922 and 1925 abolished the distinction between realty and personalty so far as devolution and distribution are concerned.

It follows from what I have said that, in my judgment, the law applicable to the distribution of the testator's estate is the law applicable to the distribution of personal property in force immediately before January 1, 1926. This view is in accordance with the decision of Eve J. in *In re Sutcliffe* (1), but I have expressed my opinion apart from that decision because the able argument addressed to me by Mr. Hunt raised points which were not brought to the notice of the Court in that case.

Solicitors: *Pearce & Sons; Burton, Yeates & Hart.*

(1) [1929] 1 Ch. 123.

E. K. C.

In re SUTCLIFFE.

ALISON *v.* ALISON.

[1881. S. 25.]

Will—Construction—Gift to Class upon Contingency—Issue of Children who should have died "leaving lawful issue . . . . then living"—Contingency not imported into constitution of Class.

A testator who died in 1878 by his will directed his trustees to divide the income of his residuary estate until the death of his last surviving child into five equal parts and to pay one of such parts unto each of his five children therein named during their lives and after the death of any of them to divide the income among such of them as should from time to time be living and the issue of such of them as should have previously died leaving issue per stirpes. And after the death of the last survivor of his said five children the trustees were to convert his estate and to hold the proceeds upon trust to pay one-fifth part thereof and to divide the same amongst the issue of such of his said children as should have died leaving lawful issue who might be then living, such issue to receive the share his or her respective parents would have been entitled to in case such fifth part had been divisible equally among such parents. Each of the testator's children except the last survivor left lawful issue, some of whom were living at the date of distribution:—

Held, (1.) that the word "issue" must be construed as extending to all descendants, and that the division among them was to be a stirpital one; (2.) that the contingency that there should be issue living at the date of distribution was not to be imported by implication into the constitution of the class of issue entitled, and that therefore the personal representatives of four of the testator's grandchildren all of whom predeceased the last survivor of the testator's children without leaving issue living at her death were entitled to a share in the capital directed to be divided among the issue of the testator's children.

Rule stated in Jarman on Wills, 7th ed., at p. 1363, as laid down by Turner L.J. in *Boulton* v. *Beard* (1853) 3 De G. M. & G. 608, applied.

SUMMONS.

The testator Joseph Sutcliffe, by his will dated April 1, 1871, devised and bequeathed all the residue of his real and personal estate to his trustees upon trust as to the pure personalty for sale and conversion and investment of the proceeds thereof, and subject to the payment off of certain mortgage debts and the payment of annuities to his wife and a daughter directed his trustees to receive the rents interest and profits of his residuary estate during the lives

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of his four daughters and his son therein named and the survivors and survivor of them and to divide the said rents and profits until the death of his last surviving child into five equal parts and to pay one of such parts unto each of his daughters and his son respectively during their lives, and after the death of any of them during the lives or life of the survivor of them to pay and divide the same income equally amongst such of his five children as should from time to time be living and the issue of such of them as should have previously died leaving issue per stirpes. And after the death of the last survivor of his said five children the trustees were to sell and convert his real and leasehold estates and other property still unconverted and to hold the net proceeds of sale upon trust to pay one-fifth part thereof and to divide the same amongst the issue of such of them his daughters Harriet Alison, Elizabeth Lockwood, Sophia Cooke and Melena Sutcliffe and his son Joseph Sutcliffe as should have died leaving lawful issue who might be then living, such issue of each of his last mentioned children respectively to receive the share his or her respective parents would have been entitled to in case such fifth part had been divisible equally among such parents. And in case any of the testator's said five children should have left no issue the part or share to which the issue of such child or children would if existing have been entitled to was to fall into and follow the destination of the remainder of the five shares for the benefit of the issue of those then dead leaving issue.

The testator died on November 7, 1878, leaving the four daughters and son named surviving him. This action was commenced in 1881 by some of the beneficiaries, and judgment for administration of the estate, directing accounts and inquiries, was given in 1882. Various orders were made in the action from time to time.

The last survivor of the testator's children was Melena Sutcliffe, who died a spinster in 1932. At the date of her death there were issue living of all the remaining four children of the testator. Harriet Alison died in 1884, leaving four children, of whom three were living, and one had died a spinster. Elizabeth Lockwood died in 1911, having had five children, of whom two were still living, two had died without leaving issue surviving them, and one was dead leaving one child still living. Sophia Cooke died in 1912, leaving eight children, of all whom were living. Joseph Sutcliffe died in 1888, having had three children, one of whom died in 1915 leaving her husband and four children surviving, all of whom were still living, another died a spinster in 1928, and the third was still living. The shares of income to which grandchildren of the testator who had died leaving no issue would have been entitled if living had been directed to be paid to their personal representatives, or into Court.

The present summons, which was taken out in July, 1932, raised several questions which do not call for a report. On July 19 Eve J. delivered judgment, holding (1.) that the testator did not die intestate as to any part of his residue; (2.) that the rule in *Sibley* v. *Perry* (1) did not apply, and that the word "issue" must be construed as including descendants of every degree, who would take per stirpes, children not taking in competition with their parents. The summons was afterwards amended by adding the following question: whether in the events which had happened the personal representatives of Mary Janet Alison, John Allen Lockwood, James Herbert Lockwood and Gertrude Sutcliffe (being children of the testator's daughters Harriet Alison and Elizabeth Lockwood and of his son Joseph Sutcliffe), all of whom predeceased his daughter Melena Sutcliffe and left no issue living at the death of Melena Sutcliffe, were entitled to a share in the capital by the will directed to be divided after the death of Melena Sutcliffe among the issue of the testator's daughters and son mentioned in the will.

Alfred Adams for the applicant.

A. Guest Mathews for grandchildren of the testator living at the death of Melena Sutcliffe.

The will provides for a stirpital distribution of the residuary estate at the death of the last survivor of the testator's children among the issue of the children, and the intention is clearly shown that it is only the issue "who may be then living" who are to take shares, i.e., issue living at the time of distribution. There is a direction to "pay" each share to the persons entitled which assumes they are then living. Therefore the personal representatives of deceased grandchildren who died leaving issue which predeceased Melena Sutcliffe are not entitled to any share. The division of income among children and their issue is only among "such as might from time to time be living," and in the final gift over there occur the words "if existing" referring to the time of distribution: *Selby* v. *Whittaker* (1), a decision which has not been disapproved of where, as here, the division is to be stirpital; *Hickling* v. *Fair.* (2)

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(1) (1802) 7 Ves. 522.

This is the only reasonable and sensible construction, making the will consistent throughout.

Wilfrid Hunt for great-grandchildren of the testator adopted this argument.

B. G. Burnett-Hall for the legal personal representatives of grandchildren of the testator who died before the period of distribution without leaving issue.

The case falls within the rule stated in Jarman on Wills, 7th ed., at p. 1363: "In the case of a gift to a class upon a contingency, the general rule is that the contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency": *Boulton* v. *Beard* (3); *Hickling* v. *Fair* (2); *In re Walker.* (4) The decision in *Selby* v. *Whittaker* (1) is distinguishable and an exception to the general rule, turning as it did on the words of the particular will. All the testator's children left lawful issue some of whom were living at the date of distribution, and all their issue take per stirpes whether such issue were living at that date or not.

W. A. Peck for the trustees.

Cur. adv. vult.

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(1) (1877) 6 Ch. D. 239.
(2) [1899] A. C. 15.
(3) 3 De G. M. & G. 608.
(4) [1917] 1 Ch. 38.

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Dec. 19. EVE J. I have already decided that the testator did not die intestate as to any part of his residuary estate, and that on the death in February, 1932, of his daughter Melena, a spinster and the last survivor of his five children, the net residue was held upon trust for payment and division amongst the issue of such of his other four children as should have died leaving issue who might be then living, that the word "issue" is to be construed as extending to all descendants, and that the division is to be a stirpital one.

At the death of Miss Melena Sutcliffe there were issue living of each of her three sisters and of her brother. Two of the sisters, Mrs. Alison and Mrs. Lockwood, and the son, had also had children who died in the lifetime of Melena without leaving issue living at the date of her death, and I am now called upon to decide whether the class is confined to issue living at the date of Miss Melena's death or whether it is to be construed as including the children who were then dead and whose legal personal representatives are respondents to this summons.

The point has been dealt with in several reported cases, and the weight of authority supports the contention that the children ought to be included and that the class ought not to be restricted to the issue living at the happening of the contingency. The rule to be applied, according to the authorities, is thus stated in the seventh edition of Jarman on Wills, vol. ii., at p. 1363: "In the case of a gift to a class upon a contingency, the general rule is that the contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency."

The first authority cited in support of that statement of the rule was *Boulton* v. *Beard* (1), a judgment of Knight Bruce and Turner L.JJ., which I do not pause to read as it is quoted in full in the next case I am about to refer to, which is that of *In re Orlebar's Settlement Trusts* (2), decided by Hall V.-C. In that case, which arose under a settlement, the limitations which came into effect in the events which

(1) 3 De G. M. & G. 608.

(2) (1875) L. R. 20 Eq. 711, 712, 716.

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happened are to be found at the bottom of p. 712 and the top of p. 713. There were life interests given to Elizabeth Hancock and Maria Orlebar "during their respective lives in equal shares for their separate use, 'and after the decease of either of them leaving a child or children, then as to one moiety of the whole of the trust premises, upon trust to assign, transfer, pay, and make over'" and so on "'among such one or more of the children of the said Elizabeth Hancock and Maria Orlebar, who should first happen to depart this life, or the issue of such children as might be then dead leaving issue living at his or their death, or born in due time afterwards,'" and then, "'at such age' and in such manner as the said Mary Caroline Orlebar should by deed or will appoint, and in default of appointment" (this is what happened) "then upon further trust to transfer, pay, and make over the said moiety whereof there should be no such appointment 'unto all and every the child or children of the said Elizabeth Hancock or Maria Orlebar, who should first happen to depart this life, and the issue of such of their said children as might be then dead (such issue to take the share of his or her parent), equally between and among them (if more than one), share and share alike, and if there should happen to be but one such child, then the whole to such only child.'" Then there is a provision that they were only to attain a vested interest on reaching twenty-one. Hall V.-C., after stating the facts, says (1): "I think that I must construe this instrument according to what I take to be the actual meaning of the words used in the trust for children; that is to say, as a trust in favour of 'all and every the child or children of the said Elizabeth Hancock and the issue of such of their said children as might be then dead.' The words are 'unto all and every the child or children of Elizabeth Hancock,' with a substitution of issue for such as might be dead; and the words 'all and every the child or children,' as I construe them, include all the children and not merely those who survive the tenant for life; and the fact of any children or issue taking being made dependent on the fact of some one

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(1) L. R. 20 Eq. 716, 718.

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child surviving, is not, in my judgment, according to the language of the instrument, or according to authority, sufficient to cut down the objects to take to those alone who are mentioned as being only to take provided one object survives; in other words, that the contingency upon which the gift is to take effect is not to be imported into the constitution of the class who are to take under the trust itself." Then he refers to *Boulton* v. *Beard* (1), and quotes at length the judgments of Knight Bruce and Turner L.JJ. He says: "The trusts in *Boulton* v. *Beard* (1) were trusts of one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go and be equally divided among his or her children as they should attain twenty-one. And it was held that a child of C. R. who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest." Knight Bruce L.J. said this: "The question is, whether a child of Catherine Rayner, who, after the testatrix's death, died in the lifetime of Catherine Rayner, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which Catherine Rayner was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of a gift to Catherine Rayner for life, and after her death in the language of the will, omitting the condition of Catherine Rayner leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if Catherine Rayner should die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will, and guessing away what is plain, if we acceded to the argument addressed to us on behalf of the defendant." Then Turner L.J. says: "I concur entirely with the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule."

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(1) 3 De G. M. & G. 608, 611, 612.

The matter does not stop there: it was further considered in the House of Lords in *Hickling* v. *Fair.* (1) I do not think I need read the headnote; but Lord Davey, in the course of his speech, after expressing surprise that anybody should have found it possible to arrive at an opinion different from that which he was about to express, says this: "It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency." Then he reads the judgment of Turner L.J. in *Boulton* v. *Beard* (2), and after dealing with the case which has been relied upon here which was also relied upon in that case as leading to a different conclusion—*Selby* v. *Whittaker* (3)—he points out that in that case Sir George Jessel M.R., who gave the leading judgment, recognized the existence of the rule but did not think it was applicable in that particular case; he relied there on the "reason of the thing"; he thought it was so unreasonable that he determined that the rule ought not to be applied; which shows, as appears from the observations

(1) [1899] A. C. 15, 35.

(2) 3 De G. M. & G. 608, 611, 612.

(3) 6 Ch. D. 239.

EVE J.
1933
SUTCLIFFE, *In re.*
ALISON *v.* ALISON.

of Lord Davey in his speech, that *Selby* v. *Whittaker* (1) was a case which was decided on the particular will there, and the Court of Appeal did not contemplate thereby setting at nought the rule which had been so well established.

The matter was finally dealt with by Younger J. (as he then was) in *In re Walker* (2), where, after dealing with the authorities to which I have referred, he came to the conclusion that the rule in *Boulton* v. *Beard* (3) must be applied, and that the contingency did not affect injuriously the interests of those who did not live to survive.

In those circumstances, I must answer this question by holding that the legal personal representatives of those children of whom they are legal personal representatives are entitled to share.

Solicitors: *Jaques & Co., for Hall, Walker & Norton, Huddersfield; Stephens & Sons.*

H. L. L.

In re BARRY AND STAINES LINOLEUM, LIMITED.

MAUGHAM J.
1933
Oct. 16.

[00545 of 1933.]

Company—Director—Qualification Shares—Acquisition after time fixed—Re-appointment—Resignation—Re-election—Office and remuneration of Director after end of time fixed and before acquisition of shares—Liability—Relief—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 141, 372, *sub-ss.* 1, 2.

A director failed to obtain his qualification shares within the time fixed, thinking that he had them at the date of his appointment, and having either overlooked or forgotten the definition of "qualification shares" in the company's articles of association. At the end of the time he ceased, in accordance with sub-s. 3 of s. 141 of the Companies Act, 1929, to be a director, but continued to act and to receive remuneration as a director, thus incurring penalties under sub-s. 5. Later, he was re-appointed by the board pursuant to the company's articles of association, retired, and was re-elected by the shareholders. He applied to the Court by petition under sub-s. 2 of s. 372 for relief against any

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(1) 6 Ch. D. 239.

(2) [1917] 1 Ch. 38.

(3) 3 De G. M. & G. 608, 611, 612.

MAUGHAM J.

1933

BARRY AND STAINES LINOLEUM, LD., *In re.*

liability which he had incurred by acting and receiving remuneration as a director after he had ceased to be a director:—

Held, that the Court has jurisdiction under sub-s. 1 of s. 372, to relieve a director who has acted as a director without having obtained qualification shares within the prescribed period from the penalties imposed by s. 141.

But *semble*, the Court will in general decline to relieve a director from liability to repay moneys to a company or its liquidator in the absence of evidence as to the wishes of the shareholders or, if the company is insolvent, of the creditors.

PETITION.

This was a petition for an order under s. 372 of the Companies Act, 1929 (1), relieving the petitioner from any liability incurred by him, under s. 141 of the Act or otherwise (2) [see p. 229], in respect of his having acted as a director of a company and received remuneration as a director after he had ceased to be a director because of his having failed to obtain his share qualification, as required by the company's articles of association, within two months after his appointment as director.

By a resolution of the company's board of directors passed on February 25, 1930, under article 90 of the company's articles the petitioner and four other persons were appointed additional directors of the company. The articles provided (inter alia) as follows: Article 89: ". . . . the number of

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(1) Sect. 372, sub-s. 1: "If in any proceeding for negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit."

Sub-s. 2: "Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the court for relief, and the court on any such application shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought."

Sub-s. 3: "Where any case to which subsection (1.) of this section applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that directors shall not be less than five nor (*sic*) more than fifteen." Article 90: "The directors may from time to time appoint any qualified person to be a director, either to fill a casual vacancy or by way of addition to the board, ... Any director appointed under this article shall hold office only until the ordinary general meeting following next after his appointment, but shall then be eligible for re-election." Article 92: "The directors shall be entitled to remuneration for their services at the rate of 1000*l.* per annum each. . . . ." Article 93: "The qualification of a director shall be the holding in his own name alone, ... of ordinary shares of the company, of the nominal amount of 500*l.* at least. Any person appointed or elected a director who acquires his qualification within two months thereafter shall be deemed to have been duly qualified at the time of such appointment

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the defendant ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper."

Sub-s. 4: "The persons to whom this section applies are the following:—

(*a*) directors of a company:

(*b*) managers of a company:

(*c*) officers of a company:

(*d*) persons employed by a company as auditors, whether they are or are not officers of the company."

(2) Sect. 141, sub-s. 1: "Without prejudice to the restrictions imposed by the last foregoing section," (namely, restrictions on the appointment or advertisement of directors) "it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles."

Sub-s. 3: "The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification."

Sub-s. 4: "A person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification."

Sub-s. 5: "If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director."

or election." Article 95: "The office of director shall be vacated—(*a*) if (not being already qualified) he do not obtain his qualification within two months after his appointment. . . . ." The company's capital was 2,100,000*l.* divided into 350,000 preference and 1,750,000 ordinary shares of 1*l.* each, all issued and fully paid up. There were issued to the petitioner 1020 preference shares, which were registered in his name on or about March 25, 1930. At an ordinary general meeting of the company held on June 24, 1930, the petitioner, pursuant to article 90, retired from the office of director, offered himself for re-election, and was re-elected by a resolution. On or about August 26, 1930, the petitioner bought 2000 ordinary shares of the company. On or about May 30, 1933, it was discovered that he had not acquired ordinary shares to the nominal amount of 500*l.* by April 25, 1930 (i.e., within two months after his appointment as a director). The company and the petitioner were at once informed, and the petitioner was told that he had ceased to be a director on April 25, 1930, and was incapable of being re-appointed a director until he acquired the 2000 ordinary shares which he had bought in August, 1930, with the result that his re-appointment on June 24, 1930, was inoperative. By a resolution of the board passed on June 8, 1933, the petitioner was re-appointed a director, pursuant to article 90, retired, and, upon offering himself for re-election by the shareholders at an ordinary meeting held on June 28, 1933, was re-elected.

The petitioner had originally been appointed a director following a fusion of the company's interests with those of a Scottish company of which he had till then been a director. The articles in force when he was appointed were adopted by the company at the time of the fusion. The Scottish company's articles provided that the qualification of a director of the Scottish company should be a holding, in his own name alone, of shares of the Scottish company, whether ordinary or preference, to the nominal value of 1000*l.* at least. The petitioner either did not notice when reading the company's articles, or did not remember when he had read them, that the qualification for directorship under them differed from that under the Scottish company's articles, i.e., that they required a director's holding to be a holding of ordinary shares.

The petition came before the Court on October 16, 1933. In it the petitioner stated that from April 25, 1930, to June 1, 1933, he acted as a director, and performed his duties and used his best endeavours to serve the company to the best of his ability as a director. He had, he said, been paid by the company at the rate of 1000*l.* a year from April 1, 1930, to March 31, 1933, but had been paid nothing for the period from that date till June 1, 1933. He further said that, as far as he could remember, no one had told him that a holding of preference shares was not a qualification for the office of a director of the company, or that the 2000 ordinary shares which he bought in 1930 were acquired too late. He stated also that until June 1, 1933, he acted upon the belief and assumption that the 1020 preference shares which he had acquired constituted a director's qualification. He submitted that in acting as a director from April 25, 1930, to June 1, 1933, he had acted honestly and reasonably, and by the petition asked to be relieved pursuant to s. 372 of the Companies Act, 1929, from any liability for fines or penalties which he might have incurred, under s. 141 of the Act or otherwise, by reason of his negligence, default, breach of duty or breach of trust in having acted without being qualified as a director of the company after April 25, 1930, and from any liability which he might be under to the company in respect of his negligence, default, breach of duty or breach of trust in drawing or receiving remuneration as a director in accordance with article 92, in respect of the period from April 25, 1930, to June 1, 1933, during which he acted as but was not in fact a director.

Gordon Brown for the petitioner. Among the proceedings to which s. 372, sub-s. 1, of the Companies Act, 1929, applies, are proceedings under s. 275. It applies also to proceedings to recover penalties imposed by the Act, including the penalty imposed by s. 141 on those who act as directors without having duly obtained their qualification shares. Where a director, apprehending that a claim may be made against him under s. 372, sub-s. 1, applies to the Court for relief, the Court can grant it, having power to do so under sub-s. 2 of that section. The present case is one in which the Court ought to grant that relief.

T. D. D. Divine for the company.

MAUGHAM J. This petition is of a somewhat unusual character. I believe it to be the first to be presented under s. 372 of the Companies Act, 1929, which, I think, is a repetition of s. 279 of the Companies (Consolidation) Act, 1908. I accede to the view, which has been put forward on behalf of the petitioner, that s. 372, sub-s. 1, of the Companies Act, 1929, applies (inter alia) to a proceeding against an officer of a company under s. 275 (the misfeasance section). It is beyond doubt that it applies also where proceedings are being taken in a Court of summary jurisdiction to recover one of the penalties imposed on directors and others under the Act and accordingly, it includes power to relieve against the penalty imposed under s. 141 of the Act on directors who act as such without having obtained their qualification shares within two months of their appointment as directors or within such shorter time as may be fixed by the articles of association. I also accept the contention that s. 372, sub-s. 2, gives power to the Court to grant relief in cases where application is made for it by a director who, although no proceedings such as are described in sub-s. 1 are being taken against him, apprehends that a claim may be made against him under that sub-section. A director apprehending such a claim may apply to the Court for relief, and in my opinion the Court, upon such an application is given, in the words of sub-s. 2, " the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought." On the other hand it is quite clear that there is a wide difference between proceedings before a Court of summary jurisdiction for a fine or penalty and proceedings either by a company to recover moneys due to the company as a going concern from one of its officers or by a liquidator or shareholder for misfeasance. In the case of police court proceedings, prima facie, no doubt, some informer applies to the Court for the fine or penalty, the relevant section being s. 365 (which makes provision for fines or penalties and defines the expression " officer in default "), s. 366 (which deals with the prosecution of offences punishable by fine) and s. 367 (which deals with the application of fines). It will be observed that under s. 367, " The court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings or in or towards the rewarding the person on whose information or at whose suit the fine is recovered, and subject to any such direction all fines under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer." Where proceedings are in the nature of a claim by the company or the liquidator with regard to something which a director may be made to pay to the company or something which may be directed, under s. 276 (which gives to the Court power to assess damages against delinquent directors, managers, liquidators or officers) to be contributed to the company's assets by way of compensation, the Exchequer is not, at any rate directly, concerned, and the sum is prima facie to go to benefit shareholders if the company is solvent or creditors if it is insolvent. Sect. 372, sub-s. 2, of the Companies Act, 1929, says nothing about the parties who ought to be present when an application for relief under the section is made, or about the circumstances in which the Court is to relieve an officer of a company from liability to the company or to an order under 276, and in my opinion, although, as I have said, I think that there is jurisdiction under s. 372, that jurisdiction ought to be exercised with great care.

In the present case the petitioner has in my opinion acted honestly and reasonably, notwithstanding that there was a certain negligence in his not ascertaining that the articles of imposed by s. 141 on those who act as directors without having duly obtained their qualification shares. Where a director, apprehending that a claim may be made against him under s. 372, sub-s. 1, applies to the Court for relief, the Court can grant it, having power to do so under sub-s. 2 of that section. The present case is one in which the Court ought to grant that relief.

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In the present case the petitioner has in my opinion acted honestly and reasonably, notwithstanding that there was a certain negligence in his not ascertaining that the articles of association required him to obtain his qualification of five hundred ordinary shares within two months after his appointment as a director. The circumstances set out in the petition show that the negligence was not of a very serious character, and with regard to the fine not exceeding five pounds to which the petitioner is liable ". . . . for every day during which the default, ... continues, ..." I have no hesitation in coming to the conclusion that I ought to relieve him wholly from his liability to that fine, a liability of a penal character which I think that he ought not, in the circumstances, to be made to undergo.

Under s. 372, sub-s. 2, however, the position seems to be different. In the present case I have no evidence of the view taken by the shareholders or by the petitioner's brother directors as to the petitioner's liability to repay to the company the whole of the remuneration which he received as a director while de jure he was not a director. It does not seem to me that the Court ought to be willing to exercise its jurisdiction under sub-s. 2, without clear evidence as to the opinions held on the subject by the persons concerned. If, for example, a director by reason of an incautious vote has made himself liable to pay moneys to a company by reason of a contract entered into it would not be right for the Court to render proceedings by the company or its liquidator abortive without information as to the views of the creditors or shareholders. In the present case the company is solvent and it may be that the shareholders would be unwilling to direct proceedings to be brought against the petitioner in respect of sums paid to him as a director to which he was not entitled. But I have no information with regard to that matter and, accordingly, while granting relief under the first part of the prayer of the petition and relieving him from any liability for fines or penalties incurred by his having acted as a director without being qualified, I do not propose to grant him relief under the second part of the prayer in respect of his having drawn or received remuneration while so acting as a director.

Solicitors: *Linklaters & Paines.*

K. R. A. H.

In re LENNARD.

LENNARD'S TRUSTEE *v.* LENNARD.

CLAUSON
J.

1933
Nov. 14, 22.

[1933. L. 501.]

Principal and Surety—Covenant to pay Annuity—Bankruptcy of principal Debtor—Proof by Annuitant for capital value of Annuity—Claim by Trustee in Bankruptcy against Executors of deceased Surety to principal Debtor's share of Residue—Right of Executors to indemnify Estate of Surety out of share—Claim by Executors to such right of indemnity in respect of sums expended by them in excess of balance owing to Annuitant.

By deed dated March 16, 1906, F. W. Lennard bound himself by covenant to pay an annuity of 108*l.* to Catherine Cooper from and after the death of her husband (which occurred on November 13, 1923); and Frederick Lennard, the father of the covenantor, guaranteed payment of the annuity. On August 21, 1911, F. Lennard died; and, under his will, F. W. Lennard became entitled on the death of the testator's widow to a one-fifth share of the ultimate residue of his estate. On October 17, 1929, F. W. Lennard was adjudicated bankrupt. On October 30 Mrs. Cooper proved in the bankruptcy, and early in 1930 her proof was admitted for the sum of 673*l.* 17*s.* 8*d.*, and she received by way of dividend in respect thereof 134*l.* 15*s.* 7*d.* Ignoring that proof, the executors proceeded to pay certain instalments of the annuity amounting to 344*l.* 9*s.* 10*d.*, and on September 8, 1932, they expended the sum of 849*l.* on the purchase for her of an annuity of 108*l.*

On January 18, 1931, the widow of F. Lennard died, and thereupon the trustee in bankruptcy became entitled to payment of the share of the bankrupt in the residuary estate of F. Lennard, subject to such right as the executors had to have the estate of the surety indemnified out of the share therein of F. W. Lennard, the principal debtor, against any claim upon that estate by Mrs. Cooper. In this action the trustee in bankruptcy claimed a declaration that the executors were not entitled (as they claimed to be) to retain out of the said share of the bankrupt, on account of any unsatisfied liability of the bankrupt, as the principal debtor, to indemnify the estate of the surety, any sum in excess of the sum of 539*l.* 2*s.* 1*d.*, being the amount of Mrs. Cooper's proof less the dividends of 134*l.* 15*s.* 7*d.*:—

Held, that, on the principle recognized in *In re Melton* [1918] 1 Ch. 37, the executors were, notwithstanding the bankruptcy, entitled to apply the share in their hands of the principal debtor in discharging his obligation to indemnify the estate of their testator, the surety; and that, having regard to the fact that Mrs. Cooper proved in the bankruptcy, they were entitled to retain out of that share the sum for which Mrs. Cooper proved less the amount received by her by way of dividend, but were not entitled to retain any sum in excess thereof.

ACTION.

By an indenture of March 16, 1906, for the consideration therein expressed, Frederick William Lennard and Thomas Wade Lennard jointly and severally covenanted with Harold Cooper that they or one of them would thereafter pay to Harold Cooper for the term of his life and, in the event of Catherine J. Cooper, his wife, surviving him, then to her for the term of her life the annuity or yearly sum of 108*l.*, the same to be payable without any deduction by four equal quarterly payments: and by the same deed Frederick Lennard, the father of Frederick William Lennard, covenanted and guaranteed with and to Harold Cooper that the covenantors or one of them would thereafter pay the said annuity in accordance with the terms of their joint and several covenant.

On August 21, 1911, Frederick Lennard died: and under his will F. W. Lennard became entitled, subject to the payment of certain annuities to the testator's daughters and to the payment of the residue of the income to the testator's wife during her life and subject after her death to certain appropriations of investments in favour of his daughters, to a one-fifth share of the ultimate residue of the testator's estate.

On October 17, 1929, F. W. Lennard was adjudicated bankrupt: and Mrs. Cooper, who had become entitled, upon the death of her husband, the said Harold Cooper (which occurred on November 13, 1923), to payment of the said annuity under the bankrupt's covenant contained in the deed of 1906, on October 30, 1929, valued her annuity at the sum of 673*l.* 17*s.* 8*d.* and proved for that sum in the bankruptcy, and early in the year 1930 her proof was admitted for that sum of 673*l.* 17*s.* 8*d.* On July 9, 1930, she received 101*l.* 1*s.* 8*d.* by way of dividend at the rate of three shillings in the pound, and in June, 1932, a further dividend of 33*l.* 13*s.* 11*d.*, making a total dividend of 134*l.* 15*s.* 7*d.* in respect of her proof.

The executors of Frederick Lennard's will, ignoring the fact that Mrs. Cooper had proved in the bankruptcy for the value of her annuity, nevertheless proceeded to pay to the annuitant certain instalments of the annuity amounting together to 344*l*. 9*s*. 10*d*.; and on September 8, 1932, they expended in the purchase of an annuity for her of 108*l*. the sum of 849*l*.

On January 18, 1931, the widow of Frederick Lennard, the tenant for life under his will, died; and thereupon the trustee in bankruptcy of F. W. Lennard became entitled to payment of the one-fifth share of F. W. Lennard in the residuary estate of the testator, subject to such right, if any, as the executors of Frederick Lennard, the surety, had to have the estate of their testator indemnified out of the principal debtor's share therein against any claim upon that estate by Mrs. Cooper.

The trustee was ready to concede the right of the executors to retain out of F. W. Lennard's share of residue the said sum of 539*l*. 2*s*. 1*d*.—namely: 673*l*. 17*s*. 8*d*., the amount of Mrs. Cooper's proof less the dividends of 134*l*. 15*s*. 7*d*.; but the executors claimed the right to retain out of the said share the before mentioned sums of 344*l*. 9*s*. 10*d*. and 849*l*., making together the sum of 1193*l*. 9*s*. 10*d*.

In this action the trustee claimed (1.) a declaration that the defendants, the executors of Frederick Lennard, were not bound or entitled to pay out of their testator's estate to Mrs. Cooper in respect of his guarantee under the deed of 1906 any sum in excess of the sum of 539*l*. 2*s*. 1*d*.; (2.) a declaration that any sums so paid by the executors in excess of 539*l*. 2*s*. 1*d*. were so paid in breach of trust and that they were personally liable to make good the same; and (3.) a declaration that they were not entitled to retain out of the share of the bankrupt in the estate of their testator on account of any liability of the bankrupt to indemnify the estate of the surety any sum in excess of the sum of 539*l*. 2*s*. 1*d*.

J. F. W. Galbraith K.C. and *C. Montgomery White* for the plaintiff. The executors of the deceased surety are not entitled, as they claim, to retain out of the share of the principal debtor in the estate of the surety any sums paid by them in excess of the sum of 539*l*. 2*s*. 1*d*. To the extent of that sum and no further they are entitled to something in the nature of an equitable lien upon that share in respect of the principal debtor's obligation to indemnify the estate of the surety against any sum his executors might be called upon to pay under his guarantee: *In re Melton.* (1) The annuitant, by electing to capitalize her annuity and prove in the bankruptcy, converted her right to receive an annual sum into a right to immediate payment of a gross sum: *Ex parte Bates.* (2) After the annuitant had so quantified the liability of the principal debtor, the debtor was no longer under an obligation to continue the annual payments; and the executors of the surety acted wrongly in expending money in excess of that quantified amount of 539*l.* 2*s.* 1*d.* The limit of the principal debtor's liability to his surety was the full amount provable against his estate in the bankruptcy less the dividends paid in respect of that liability: *Wolmershausen* v. *Gullick.* (3) The surety was entitled to call upon the creditor to quantify her liability and to prove for it, or he might have paid her the full amount of her proof and taken over her right of proof: *Ex parte Rushforth* (4); Williams' Bankruptcy Practice, 14th ed., p. 165. Here the debt has been only partially discharged and the surety was liable for the balance which remained—namely, 539*l.* 2*s.* 1*d.*, but was under no further liability: *Perry* v. *National Provincial Bank of England* (5); Rowlatt on Principal and Surety, 2nd ed., p. 120.

H. Wynn Parry for the executors of the surety. The right of the annuitant against the surety's estate remained unaffected by her proof in the bankruptcy of the principal debtor: by proving she did not release her right against the surety. The intention of the parties to the deed of 1906 was that, if the son did not pay the annuity by the instalments and in accordance with the terms of that deed, his father would, and the father's liability as surety was a several liability. For the purpose of proving, it became necessary for the annuitant to put a value on the principal debtor's liability; but it would be inequitable if the effect of such valuation was to limit the liability of the surety. The proof only went in aid of the surety's liability to pay the annuitant 108*l.* during her life by certain instalments, and did not otherwise affect it. The proof was not for a debt, as in *Ex parte Rushforth* (1), but for the capital value of a life annuity, a case in which injustice might be wrought. But for the bankruptcy of the principal debtor, the annuitant could have proceeded against him and the surety in personam. The change in the remedy to proof against the estate of the principal debtor in accordance with the requirements of s. 30 of the Bankruptcy Act, 1914, was a change brought about not at the volition of the annuitant but by the law of bankruptcy.

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(1) [1918] 1 Ch. 37.
(2) (1879) 11 Ch. D. 914.
(3) [1893] 2 Ch. 514, 528.
(4) (1805) 10 Ves. 409.
(5) [1910] 1 Ch. 464, 477.

Galbraith K.C. replied.

Cur. adv. vult.

Nov. 22. CLAUSON J. On March 16, 1906, F. W. Lennard and T. W. Lennard bound themselves by covenant to pay an annuity of 108*l.* per annum to Mrs. Cooper from and after the death of her husband Mr. Cooper (which eventually occurred on November 13, 1923). Frederick Lennard guaranteed the payment of the annuity.

On August 21, 1911, Frederick Lennard died, and by virtue of his will F. W. Lennard thereupon became entitled, subject to the life interest of Frederick Lennard's widow, who died on January 18, 1931, to a one-fifth share of Frederick Lennard's ultimate residuary estate. I use the latter expression, because on the widow's death certain sums had to be raised out of the residue, and F. W. Lennard's share falls to be calculated only on the ultimate residue left after the raising of those sums. This circumstance is not, however, material to any point that I have to decide.

In the year 1929 F. W. Lennard was adjudicated bankrupt. This circumstance at once affected the position and rights of (*a*) Mrs. Cooper, the annuitant, and (*b*) the executors of the surety Frederick Lennard. Mrs. Cooper's right to recover her annuity from F. W. Lennard was turned into a right to prove in F. W. Lennard's bankruptcy for the value of the annuity. The right of the executors to be indemnified by F. W. Lennard for any sum they might pay to Mrs. Cooper under their suretyship liability was turned into a right to prove for a lump sum in F. W. Lennard's bankruptcy, a right which, by reason of the rule against double proof, they could not exercise, if Mrs. Cooper proved for her annuity.

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(1) 10 Ves. 409.

On October 30, 1929, Mrs. Cooper proved in the bankruptcy, and on June 7, 1930, her proof was admitted for the sum of 673*l*. 17*s*. 8*d*. By so proving she prevented the executors from proving. The executors thenceforward were in this position: they could not refuse to pay Mrs. Cooper her annuity as the instalments fell due, but they were entitled to make it a condition of payment that she should give them either absolutely or at all events to the extent necessary to recoup to them any payment they might make to her—I do not pause to consider which is the correct alternative—the benefit of her proof in the bankruptcy. They in fact proceeded to pay Mrs. Cooper certain instalments of the annuity amounting to 344*l*. 9*s*. 10*d*., and they then proceeded to purchase an annuity for her at a cost of 849*l*. These sums amount to 1193*l*. 9*s*. 10*d*. Thereupon, as between themselves and Mrs. Cooper, they became entitled to Mrs. Cooper's proof.

On January 18, 1931, Elizabeth Lennard, the tenant for life, died, and thereupon F. W. Lennard's trustee in bankruptcy became entitled to payment of F. W. Lennard's one-fifth share in Frederick Lennard's ultimate residuary estate, but this right of payment is admittedly subject (on the principle recognized in *In re Melton* (1)) to the right of the executors to refuse to pay the share over until they have recouped to the estate of Frederick Lennard out of the share all moneys due to that estate from F. W. Lennard. They claim to retain out of the share 1193*l*. 9*s*. 10*d*. made up in the manner that I have explained.

F. W. Lennard's trustee in bankruptcy is prepared to concede (on the footing of course that there is to be no further claim for dividends in respect of Mrs. Cooper's proof) that the executors are entitled to retain out of his share 673*l.* 17*s.* 8*d.*, the amount of Mrs. Cooper's proof, less the dividends (amounting to 134*l.* 15*s.* 7*d.*) already paid on account of the proof to Mrs. Cooper—namely, a resulting figure of 539*l.* 2*s.* 1*d.*, but he demurs to the retention by the executors out of the share of any larger sum than this 539*l.* 2*s.* 1*d.*

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(1) [1918] 1 Ch. 37.

In my view, the contention of F. W. Lennard's trustee in bankruptcy is correct, and the maximum sum which the executors of Frederick Lennard are entitled to retain out of this share is 539*l.* 2*s.* 1*d.*

It will be observed that, on any other view than that which appears to me to be the correct one, F. W. Lennard's estate available to meet his creditors would be depleted, in virtue of his liability to pay Mrs. Cooper's annuity, by a sum exceeding the amount which has been fixed under s. 30 of the Bankruptcy Act, 1914, by the machinery of Mrs. Cooper's proof, as the sum which is the true value of that liability; and this would obviously do violence to the principle embodied in the Act, that all liabilities of this character must be quantified at a lump sum.

It may be suggested that the view which I take results in this, that Mrs. Cooper is or may be deprived, by virtue of the principal debtor's bankruptcy, of her right to require the surety to carry out the debtor's obligation, modo et forma, by making the stipulated periodical payments. The answer is that that is not the case. It would have been perfectly open to Mrs. Cooper to stand aside from the bankruptcy, and to abstain from proving, and to call upon the executors to make the periodical payments of her annuity in due course. If she had done so, the executors would have been enabled to prove against the estate in respect of their suretyship right of indemnity and would thus have been furnished with funds, which, if the sum for which they were allowed to prove were (as must of course be assumed) correctly calculated, would (subject to the bankrupt's estate paying 20 shillings in the pound) indemnify them against Mrs. Cooper's claim. If the calculation turned out erroneous, or if the estate failed to pay 20 shillings in the pound, the detriment to the executors would be just the detriment which always follows to a proving contingent creditor, if the estimate which the statute enforces turns out in the event to be unsatisfactory, or the bankrupt's estate turns out to be insufficient. For any such detriment there is, of course, no remedy. It is quite true that in this particular case Mrs. Cooper proved, and proved, as it is suggested, and I dare say quite correctly, at an unduly low figure: the effect was that the executors were precluded (by reason of the rule against double proof) from themselves proving. But the executors had the remedy in their own hands. They were entitled, according to well established doctrine, to pay Mrs. Cooper the full amount of her proof and take over the proof: they would then have been in a position to refuse Mrs. Cooper any further payment, on the ground that the liability for which they were sureties had been discharged. This would have put an end to Mrs. Cooper's right to call upon the executors to pay her her annuity by the proper instalments, according to the tenor of the obligation. But this right would have been lost to Mrs. Cooper, not by reason of Frederick W. Lennard's bankruptcy, but by reason of her having put in a proof in his bankruptcy, a step which was entirely within her own volition.

As a matter of fact the executors made the very grave mistake of ignoring the fact of Mrs. Cooper's proof altogether. They proceeded to pay or provide for Mrs. Cooper's annuity in full, assuming, I imagine, that they could recoup themselves for these payments out of F. W. Lennard's fifth share in the estate. But as to this they are in a further difficulty. The principle on which *In re Melton* (1) proceeds, which involves that the executors may, notwithstanding assignment or bankruptcy, apply the money coming to a beneficiary from a share of the estate in discharging his obligations to the estate, obviously cannot justify the executors in discharging the obligation in any more liberal manner than is strictly necessary. Having regard to the fact that Mrs. Cooper had proved in the bankruptcy, they were in a position to discharge F. W.

(1) [1918] 1 Ch. 37.

Lennard's obligation to indemnify the estate of the surety by paying her out of F. W. Lennard's share in the estate the amount of the proof, in excess of her dividends, in full; and under those circumstances they were not justified in expending any larger sum than that out of F. W. Lennard's share in the estate. In so far as they have spent any larger sum, they cannot justify the payment or charge it as against F. W. Lennard's trustee in bankruptcy.

The plaintiff, the trustee in bankruptcy, is entitled against the defendants, the executors and trustees of Frederick Lennard's will, to the declarations he asks.

To those declarations it is desirable to add a declaration that, in the event of the defendants deducting any sum out of the share of the bankrupt in the estate of the testator on account of the liability of the bankrupt to indemnify as aforesaid, the defendants will be bound to indemnify the plaintiff against payment of any sum to Mrs. Cooper in respect of her proof in the bankruptcy in excess of the aggregate of the dividends already paid to her and the sum so deducted. If, as appears to be the fact, the bankrupt's share exceeds 539*l.* 2*s.* 1*d.* this declaration means, in substance, that neither Mrs. Cooper nor the defendants in her right can ask for any further dividends. This follows logically from the position as I have expounded it above.

Solicitors: *Boxall & Boxall, for Edwin Boxall & Kempe, Brighton; W. P. Guillet & Dawkins.*

H. C. H.

CLAUSON J.

1933

Nov. 20, 22; Dec. 6.

DENNIS *v.* MALCOLM.

[1933. C. 1971.]

School—Site—Schools Sites Act, 1841 (4 *&* 5 *Vict. c.* 38), *s.* 2*—Construction—Close of School—Land ceasing to be used for purposes of the Act—Reverter of Land to Estate in Fee Simple—Land Registry—Refusal of Registrar to register—Right of Appeal from Registrar—Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21).

By deed poll dated December 30, 1876, and enrolled in the High Court of Justice, Chancery Division, a piece of land was, by express reference to the power conferred by s. 2 of the Schools Sites Act, 1841, and to no other, granted to trustees for the purposes of a school within the meaning of that Act.

By s. 2 of the Act it is provided that, upon the land granted under the authority of the Act ceasing to be used for the purposes of the Act, the same should thereupon immediately revert to and become a portion of the estate held in fee simple or otherwise as fully to all intents and purposes as if the Act had not been passed, anything in the Act contained to the contrary notwithstanding.

On March 22, 1932, the school was closed and the land so granted ceased to be used for the purposes of the Act. In spite thereof, the trustees, in the purported exercise of their powers for that purpose under s. 14 of the Act, proceeded to sell the land, and in the course of the negotiations for the sale objections were raised against their title on the ground that the land had, in the circumstances, reverted in pursuance of the proviso in s. 2 of the Act.

The Land Registrar having refused an application by the trustees to be registered as proprietors of the land with an absolute title, the trustees applied by summons under Order LIV.D, r. 6, to Clauson J., asking that the refusal of the Registrar might be reversed and that he might be directed to register the applicants with an absolute title:—

Held, that, in the absence of a decision or direction of the Registrar, no appeal lay from his refusal of the trustees' application.

The summons having by leave of the Court been amended so as, in conformity with Order LIV.A, rr. 1, 1A, to raise the question whether upon the true construction of the deed poll and the said Act and in the events which had happened the reverter mentioned in s. 2 of the Act took effect on March 22, 1932, in respect of the land granted by the deed poll:—

Held, that upon March 22, 1932, the date when the land ceased to be used for the purposes of the Act, the grant of the land had no operation otherwise than by virtue of and subject to the provisions contained in s. 2 of the Act, with the result that the question raised by the summons must be answered in the affirmative and a declaration to that effect made accordingly.

ADJOURNED SUMMONS.

By a deed poll under the hand and seal of Hugh Lindsay Antrobus, dated December 30, 1876, and duly enrolled in the

High Court of Justice, Chancery Division, on January 8, 1877, H. L. Antrobus, under the authority of the Schools Sites Act, 1841, voluntarily granted unto the Minister and Churchwardens of St. Philips, Cheam, and their successors a certain piece of land containing 1 rood 38 perches to hold the same for the purposes of the said Act and upon trust to permit the same and all buildings thereon to be for ever thereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring manufacturing and other poorer class in the parishes of Cheam and Cuddington and as a residence for the teacher or teachers of the school and for no other purpose inconsistent with the use of a parish school; and by the same deed it was provided that the presents were upon the express condition that if at any time thereafter the land thereby granted should for the period of six calendar months cease to be used for the purposes aforesaid or for any other purposes inconsistent with the use of a parish school, then and in such case the land should immediately revert to and become vested in the grantor his heirs and assigns as in his or their former estate.

By s. 2 of the Schools Sites Act, 1841, which enables absolute and limited owners to grant sites for schools, it is provided that upon the land so granted under the authority of the Act ceasing to be used for the purposes of the Act, the same should thereupon immediately revert to and become a portion of the estate held in fee simple or otherwise as fully to all intents and purposes as if the Act had not been passed, anything in the Act contained to the contrary notwithstanding.

It was doubtful whether at the date of the grant there were a Minister and Churchwardens of St. Philips, Cheam, as that church had only then been recently built and was without a district. There was evidence that the school that was erected on the land granted by the deed poll was financed by the Rector and Churchwardens of the parish church of St. Dunstan, Cheam, and that those persons had at all material times acted as the trustees of the school.

Upon evidence adduced at the hearing, Clauson J. found as a fact that on March 22, 1932, the school was finally closed, and that thereupon the land so granted by the deed poll ceased to be used for the purposes of the Act.

In April, 1932, during negotiations for the sale of the school site by the trustees in the purported exercise of their powers in that behalf under s. 14 of the Act, the purchaser raised objections against the title of the trustees on the ground that under s. 2 of the Act the land had, in the event which had happened, reverted, and they proposed that the trustees should apply at the Land Registry to be registered as the proprietors of the land with an absolute title. The trustees accordingly made the application, and on May 9, 1933, the Chief Land Registrar wrote a letter to the applicants' solicitors in which he informed them that his conveyancing counsel advised that the title was not fit for registration as an absolute title and stated the grounds upon which counsel's opinion was based: he informed the applicants that in those circumstances he was unable to register the applicants as proprietors of the land with an absolute title. He added that, if the applicants should wish to appeal against his decision, their application would be kept in abeyance for twenty-one days, and Order LIV.D was referred to. Accordingly, a summons was issued under that Order on behalf of the trustees of the land (the respondents to which were the trustees of the will of the grantor who died on March 18, 1899) asking that the refusal of the Registrar might be reversed and that he might be directed to register the trustees as the proprietors of the land with an absolute title; and on November 22, 1933, the summons was heard.

At the opening of the summons by counsel for the applicants, Clauson J. said that the Court would require to be satisfied that an appeal, in the circumstances, lay from the refusal of the Registrar to register the applicants with an absolute title.

G. M. Edwardes Jones K.C. and *F. Baden Fuller* for the applicants. There has been what is equivalent to a decision of the Registrar from which an appeal lies. The Registrar refused the trustees' application on the ground (as stated in his letter of May 9, 1933, to the applicants' solicitors) that there had been a reverter of the land under s. 2 of the Act of 1841. That letter was tantamount to a decision of the Registrar from which any person aggrieved is entitled to appeal to this Court: Land Registration Rules, 1925, r. 299. There was no reverter of the land under s. 2 of the Act. The reverter, as provided by that section, is to be as full and effectual as if the Act had not been passed. It is significant that the section does not contain the additional words which are contained in ss. 3 and 4 of the Act, "as if the grant had not been made." The effect of that omission from s. 2 is that, upon the land ceasing to be used for the purposes of the Act and the grant having to be construed as against the grantor, the grantor was still in the position of one who, under the School Sites Act of 1836 (6 & 7 Will. 4, c. 70), which, unlike the Act of 1841, contains no provision for the reverter of the land, or the Mortmain Act then in force, had parted with the whole of his fee simple estate in the land in perpetuity for the purposes of a school. Here, the grant being by an owner in fee simple did not require the assistance of the Schools Sites Act, 1841. In the circumstances of the case there could be no resulting trust of the land in favour of the grantor and the land remains subject to the charitable trusts: *In re Peel's Release* (1); Tudor on Charities, 5th ed., p. 157. Sect. 7 of the Act of 1841 enables the grant to be made to any corporation sole or aggregate and to the Minister of any parish being a corporation and the Churchwardens or to any trustees whatsoever and the land so granted is to vest in them for ever thereafter. In *Attorney-General* v. *Shadwell* (2), where the land was held to have reverted, the main purpose for which the grant was made had ceased within the meaning to s. 2; with the result that the land reverted. Here, the purposes of the grant did not cease; the trustees claim they were entitled in exercise of their powers under s. 14 of the Act to sell the land with the view of devoting the proceeds towards the improvement of the other schools in the parish of Cheam—namely, the Girls' and Infants' school and the Boys' school.

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(1) [1921] 2 Ch. 218.

(2) [1910] 1 Ch. 92.

Sir Gerald Hurst K.C. and *J. V. Nesbitt* for the respondents. Assuming it should be held that an appeal lies from the Land Registrar in this case, there was upon the closing of the school on March 22, 1932, a reverter of the land in accordance with s. 2 of the Act of 1841. The grantor made the grant expressly under the authority of the Schools Sites Act, 1841, and of no other authority: there was no reference generally to any other power enabling the grantor in that behalf. Even if there had been such a reference, there was at the date of the grant of 1876 no other power enabling a grantor to execute a grant of this type with a right of reverter, as the insertion of a reverter clause would have made the grant under the Mortmain Act of 1836 void. The explanation of the addition of the words "as if the grant had not been made" in the cases of ss. 3 and 4 of the Act to the words "as if this Act had not been passed" may be that a grant by the Crown to the Minister and Churchwardens of a parish and their successors made in pursuance of either of those sections was sufficient to bring about the incorporation of that body, in accordance with the intention of the legislature: see Halsbury's Laws of England, 2nd ed., vol. 8, p. 21, para. 31; but to ensure that its incorporation should subsist only so long as the purposes for which the grant was made were in operation, the words "as if the grant had not been made" were added. The power of sale given by s. 14 of the Act of 1841 can only be exercised by persons who answer the description of trustees "in whom the legal estate in the said land or building shall be vested": the applicants ceased to answer such description at the moment of the reverter—namely, on March 22, 1932: see *Sykes* v. *Williams*. (1)

CLAUSON J. In the year 1876 Mr. Antrobus, owning land at Cheam, granted under the powers of the Schools Sites Act, 1841, a piece of land to the Minister and Churchwardens of St. Philips, Cheam, and their successors for the purpose of a school, the grant being made under the authority of the Schools Sites Act, 1841, and containing at the end a proviso or condition of reverter differing in some respects from that contained in the Act. It is not suggested that that clause of reverter can have any operation.

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(1) [1933] Ch. 285.

At some date in the year 1922, the property the subject of the grant ceased to be used as a school. If before it had ceased to be used as a school and while it was still being used as a school, the trustees had thought proper to make arrangements to sell the site in order to buy another site and to continue the school on another site or raise money to continue another school, it is possible the trustees might, notwithstanding the clause of reverter, have been able to sell their land under the Schools Sites Act. But they did not do that. The school was closed and ceased to be used as a school. Some time afterwards negotiations began, which are in progress, for the sale of this piece of land to a purchaser. It will be obvious to anybody who has perused s. 2 of the Schools Sites Act, 1841, that a serious question arose as soon as the property ceased to be used as a school, because the section, while it enables persons to convey land for the purposes of a school, contains this proviso at the end that "when land or any part thereof ceases to be used for the purposes in this Act mentioned"—those purposes being "as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge"—"the same"—that is the land—"shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise or of any manor or land as aforesaid," that is the estate of which the grantor was the owner, "as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding." Accordingly, if the event occurs, namely, the site ceasing to be used as a school, this reverter clause comes into operation, as if the Act had not been passed. There are two sections, ss. 3 and 4, dealing with grants by the Duchy of Lancaster and the Duchy of Cornwall, under which similar provisions are made to enable the Duchy lands in each case to be conveyed as a site for a school, and there is a similar reverter provision with, however, this added difference that, whereas the reverter under s. 2 with which I have to deal, is to take place " as if this Act had not been passed," in the case of the other two sections, the reverter is to take place " as if this Act or as if any such grant as aforesaid had not been made."

A very subtle argument has been founded upon those sections: it has been contended that it is very significant that s. 2 provides that the reverter must operate as if the Act had not been passed, but does not contain the additional words appearing in ss. 3 and 4—namely, " as if the grant had not been made": and it is said that you must treat the grant as an existing grant, assume the Act has not been passed, and see what the result is. When I turn to the grant, I find that the utmost care has been taken to explain that the grantor, Mr. Antrobus, was acting under the authority of the Schools Sites Act, 1841, and was making the grant to the Minister and Churchwardens and their successors for the purposes of the said Act. In my view it is plain that the deed is intended to operate and operate only under the Act, and the effect of dealing with the matter as if the Act had not been passed is to destroy the authority under which and under which alone the grant was intended to operate: the result is therefore in my view precisely the same as if the statute had said the reverter is to take place as if the grant had not been made. If the deed had gone on to use some such expression as would enable me to hold that it was intended to operate either under the Act or independently of the Act, the result might be different. But I find no such expression.

Having now expressed my view as to the operation of the Act, I have to deal with some other matters which were dealt with before me. It appears that when negotiations for the sale of the land were in progress, it occurred to somebody, as there was obviously a difficulty about the title, that the best course to take was to get the title of the grantees registered as an absolute title. There were several difficulties. The first difficulty was as to the Minister and Churchwardens of St. Philips, Cheam. It is exceedingly doubtful if there was at the time of the grant a Minister and Churchwardens of St. Philips, Cheam. It is said that the grant should be read as if it were a grant to the Rector and Churchwardens of Cheam, that it was a case of mere misdescription. Everybody seems to have assumed that the grant ought to be so construed. Whether that is right or not I express no view. The matter went before the Chief Land Registrar, and in the ordinary course a report on the title was made by conveyancing counsel, who after adverting to the difficulty I have just mentioned, took the point that the title must be subject to the reverter clause. The Chief Land Registrar then communicated with the Rector and Churchwardens of Cheam, the persons seeking to be registered with an absolute title, informing them that he did not see his way, having regard to the report of counsel, to register them with an absolute title. The Rector and Churchwardens then took out this summons, entitling it in the matter of the freehold property in question and also in the matter of the Land Registration Act, 1925, for the decision of the Court on various questions, including a question whether the present Rector and Churchwardens of Cheam have the right to sell the property ; and a declaration is asked that, in the events which have happened, the applicants are the trustees of the property and have power to sell and convey the same to a purchaser free from any right, claim or interest of the respondents under the said deed, and a question is asked whether the applicants or alternately the respondents are entitled to be registered as the proprietors of the land with an absolute title. That summons was served on certain gentlemen who are the present trustees of the will of the original grantor. Whether or not they are persons of whom it can be predicated they are the owners of the estate part of which was granted by the deed of 1876, I do not know. On the evidence, this is left in doubt. That summons happened, by the chance of the ballot, to be assigned to me. However, under the arrangements for the disposal of business in this Division it came before my brother Bennett, and I understand that, after some discussion had taken place as regards the power of the Court under the summons to make such a declaration as asked, it was suggested that, notwithstanding the form of the summons, it was in substance an appeal from the decision of the Registrar to register the applicants with an absolute title. Thereupon Bennett J. pointed out that, if it was an appeal from the Registrar, the only person to deal with that was myself, as the judge named by the Lord Chancellor under the provisions of the Act, as the judge to deal with appeals from the Registrar. An application was made to me to hear it, to which I consented, but I took the precaution to require the parties to amend the summons so that I could deal with it as an appeal from the Registrar. Accordingly, the summons now asks that the refusal of the Land Registrar to register the above property pursuant to the application be reversed and that the Land Registrar be directed to register the applicants as the owners of the land with an absolute title. I have expressed my view on the point on which the parties are anxious my view should be expressed. My view accords entirely with that of the Chief Land Registrar to the extent that, whoever it is that is entitled to come in under the reverter clause, it is, in my view, impossible for the Land Registrar to register the title as an absolute title in the applicants.

But the question arises whether any appeal lies to me at all in this matter. It is quite true that I am the judge to whom an appeal lies from "an order or direction" of the Registrar. But he certainly has not made an order. Has he given a direction? All he says, in effect, is that he does not propose to proceed further with the matter. I am not satisfied that there is an order or direction from which an appeal lies. If there was any direction, it seems to me that it was a direction of an administrative character. I have looked at the matter with some anxiety and I am not disposed to allow it to be thought that, in my view, I have power, on an appeal from the Registrar, to direct the Registrar to register an absolute title about which he is not in fact satisfied. Whether there may conceivably be circumstances in which the Registrar's action or inaction can be controlled by the Court on an application for a mandamus I do not propose to examine. But I am of opinion I have no jurisdiction on an appeal from the Registrar to overrule him, if he feels a difficulty in a particular case in exercising his power to register a title as absolute. Elaborate provisions are made in the Act for dealing with difficulties that may arise on title and for enabling the Registrar to put matters in train to be decided by a competent court of jurisdiction, in the presence of the parties affected. In the circumstances, if I am to deal with the summons strictly, I can make no order upon it, except that I must order the costs of those who have been brought here on this summons to be taxed and paid by the applicants, as I am satisfied I have jurisdiction to do: see *In re J. H. Robertson's Application for Letters Patent.* (1) But if the parties desire it, I will direct that the order is not to be drawn up for a fortnight and I will give leave to the applicants to amend the present summons by entitling it in the matters of the trusts of the deed of grant of 1876 and the Schools Sites Act, 1841, and making it inter partes and by asking for the determination of the question whether, upon the true construction of the grant and of the Schools Sites Act, 1841, and in the events which have happened, the reverter took place on March 22, 1932, in respect of the land granted by the deed poll of 1876. If the summons is so amended, I will declare that such reverter took place.

The summons was so amended (all parties so desiring), and on December 6, 1933, Clauson J. made a declaration accordingly.

Solicitors: *George Thatcher & Son; Farrer & Co.*

H. C. H.

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(1) [1930] 1 Ch. 186.

LUXMOORE J.

1933

May 3, 4, 5, 9, 10, 11, 12.

SOUTHSTRAND ESTATE DEVELOPMENT COMPANY, LIMITED *v.* EAST PRESTON RURAL DISTRICT COUNCIL.

[1932. S. 2726.]

Local Government—Development of Seaside Building Estate—Company formed to provide Water Supply and Sewage Facilities—Grant by building owners to company of power to make Sewers and Drains—Rates levied by company for use of Sewers—No Profits distributed by company—" Sewers made by any person for his own profit or by any company for the profit of the Shareholders "—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 13.

In the year 1912 H. purchased a seaside estate of about 25 acres, which he proceeded gradually to develop as a residential area. The property was in a rural district, unprovided with any proper water supply or sewerage system, and therefore in 1913 a private company was formed by H., in which he held most of the shares, for the purpose of furnishing these facilities. The objects of the company as stated in its memorandum of association were to carry into effect an agreement between H. and the company, to purchase or lease any land forming part of the S. estate, to provide the S. estate with a drainage and sewerage system, and to furnish it with a water supply. In consideration of 2543*l.*, expressed to be paid as to 2000*l.* by the issue to him of 2000 fully paid 1*l.* shares, H. granted to the company full powers of constructing and laying waterworks and pipes and a sewerage system under the estate roads for the term of 99 years at a rent of 20*l.* a year with power to charge and levy rates on the tenants and occupiers for water supply and sewage facilities.

The estate was enlarged to about 50 acres in 1920 and gradually developed by building high class residences, which were connected with the sewers. The work on the sewers was done by workmen in the employment either of H. or of an estate company owning part of the S. estate, the cost being debited to the company. Rates were charged and collected on behalf of the company, and the proceeds applied for the purposes of the company, no profits being distributed among the shareholders. The company was financed by loans made by H., and it did not acquire further land or engage in any other business.

In 1930 the local District Council launched a sewerage scheme for the district, including the whole of the estate, and asked for the sanction of the Ministry of Health to a loan for that purpose. At the inquiry the council claimed that the sewers and drains on the S. estate were vested in them under s. 13 of the Public Health Act, 1875:—

Held, in an action by the company for a declaration, that the sewerage system on the estate had been made by the company for profit, although no profits had hitherto been distributed, and therefore it came within exception (1.) of s. 13 of the Act, and was vested in the plaintiff company, and not in the defendants.

Minehead Local Board v. *Luttrell* [1894] 2 Ch. 178 followed and applied.

WITNESS ACTION.

The facts are fully stated in the judgment of the learned judge, but may be summarized as follows :—

Some time before the year 1914 one William Hollis, a builder and estate agent, purchased an estate of about 25 acres of land fronting on the sea at Angmering-on-Sea in the parish of East Preston, Sussex, with the object of developing it as a high class residential estate by making roads and building houses upon it. Before 1914 Hollis had carried out a certain amount of development, but the houses built were not furnished with a proper water supply or sewage facilities. The plaintiff company was formed by Hollis and incorporated as a private company on January 3, 1914, with a capital of 3000*l.* in 3000 shares of 1*l.* each. Its principal objects, as stated in the memorandum of association, were (1.) to enter into and to carry into effect an agreement made between William Hollis and the company; (2.) to purchase take on lease or otherwise acquire any lands forming part of the Southstrand Estate at East Preston or elsewhere; (3.) to provide for and supply the Southstrand Estate with a drainage and sewerage system, and for that purpose to lay mains, sewers, etc., and to construct all necessary works; (4.) to supply the Southstrand Estate and the neighbourhood with water and to carry on the business of a water company, and for that purpose to sink wells and shafts and to do all other work and things and to enter into all agreements or arrangements necessary for the purposes of the company. There were also various ancillary powers, such as to provide a club-house and bathing facilities; but these were never exercised by the company, nor did it acquire any further land.

The agreement referred to was dated January 15, 1914, under which Hollis agreed to grant and the company agreed to take a lease of certain hereditaments, in consideration of the sum of 2000*l.* to be satisfied by the issue of 2000 shares in the company to Hollis, and the payment of a further sum of 543*l.* 2*s.* 1*d.* in respect of expenditure already made by him upon or in connection with works executed by him. By the lease which was dated February 2, 1914, Hollis in consideration of the said total sum of 2543*l.* 2*s.* 1*d.* and of the rent and covenants thereinafter reserved and contained demised to the company a small piece of land on the estate together with the right to sink a well thereon and enjoy and use all the water issuing therefrom and to convey the same water to any land or houses on the Southstrand Estate, and for that purpose to construct and lay mains and pipes and other works including a reservoir, and also full power and authority to make or construct under the whole of the estate a system of drainage with sewage pipes, manholes, septic tanks and all similar works, with all necessary rights and easements. The lease was for 99 years from September 29, 1913, at a rent of 20*l.* a year, and contained appropriate covenants, including one to connect the houses on the estate with the sewerage system, and to allow the sewage to pass down the pipes, upon payment by the tenants or occupiers of the cost of connection and a drainage rate based on the rateable value of the premises connected. Some of the sewers on the estate were constructed by Hollis before the formation of the company, and the above sum of 543*l.* was debited to the company partly in respect of these sewers and partly in respect of water supply, but was never in fact paid to Hollis.

The company carried out a considerable amount of work on the sewerage system between 1914 and 1916, when the development of the estate was stopped by the war. In 1920 the estate was extended to about 50 acres, and on December 3, 1920, an agreement was entered into between Hollis and other owners of land and the company granting the company the right to construct and maintain sewers under various new roads. The company was managed entirely by Hollis, who gave orders to the contractors for the works required on behalf of the company, the cost being debited to it. The sewage was carried down into an underground sewage tank, and ultimately pumped out into the sea through an outfall pipe. At the date when the action was brought there were 184 connections between houses and buildings on the estate and the company's sewers, and the rates charged brought in an annual income of about 700*l.* The capital expenditure of the company on the sewerage system amounted altogether to about 5949*l*. The receipts on income account were not treated as profits, but were applied in payment for work done. The company was financed throughout by loans made by Hollis.

In 1930 the defendant council desired to launch a scheme for providing the three parishes of Angmering, East Preston, and Rustington with a sewerage scheme, and on November 24, 1931, a public inquiry was held by the Minister of Health with the view of sanctioning the raising of a loan of 86,000*l*. to carry the scheme into effect. The scheme provided for the inclusion of the Southstrand Estate therein, and the defendant council claimed at the inquiry that the sewers constructed on the estate by the plaintiff company were vested in the defendant council and should be incorporated in the scheme without the payment of any compensation or value to the plaintiff company. The scheme was opposed by Hollis and others. The loan for 86,000*l*. was sanctioned by the Minister of Health in December, 1931.

The plaintiff company thereupon brought this action for a declaration that the sewers and works constructed by them on the estate were vested in and under the control of the plaintiff company and not the defendant council, and for an injunction to restrain the defendant council from connecting or interfering with or making use of the plaintiff company's sewers and works.

The defendants denied the title of the plaintiff company to the sewers and works, and pleaded that if the company had constructed any sewers and works, they had done so as agents for William Hollis, or alternatively for Angmering-on-Sea Estate Co., Ld. They further denied that the works were constructed for the purposes of profit, or independently of any sanitary purpose.

W. F. Swords K.C. and *Raymond Jennings* for the plaintiffs. The plaintiffs are entitled to the declaration which they are seeking. It is submitted that the sewers when constructed on the Angmering-on-Sea Estate were made for its own profit, which it had earned. The plaintiffs come within the exception in s. 13 of the Public Health Act, 1875. (1)

J. Scholefield K.C. and *W. G. H. Cook* for the defendants. [They referred to *Vowles* v. *Colmer* (2); *Sykes* v. *Sowerby Urban District Council* (3); *Croysdale* v. *Sunbury-on-Thames Urban District Council* (4) on the meaning of the word "profit" within s. 13 of the Public Health Act, 1875 (1); and also *Minehead Local Board* v. *Luttrell* (5) and *Vare* v. *Joy*. (6)] These pipes were not laid for profit within the meaning of s. 13 of the Public Health Act, 1875. (1)

If the plaintiffs themselves constructed any sewers, which is denied, these sewers were constructed as agents for William Hollis or alternatively for Angmering-on-Sea, Ld.; *Kent County Council* v. *Kent Coal Concessions, Ld.* (7)

W. F. Swords K.C. in reply.

Luxmoore J. The plaintiff company seeks a declaration that certain sewers and works connected with a sewerage system installed at Angmering-on-Sea, in the county of Sussex, are vested in the plaintiff company and not in the defendant council; they also claim certain ancillary relief. The East Preston Rural District Council was, at the date of the issue of the writ, the local sanitary authority for the district in which Angmering-on-Sea is situate. Since then the district has been reconstituted under the provisions of the Local Government Act 1929, s. 46, and as reconstituted is now called the Worthing Rural District Council. The Order constituting the Worthing Rural District Council provides that "legal proceedings pending immediately before the day when the Order comes into force may be amended in such manner as may be necessary to bring them into conformity with the provisions of this Order." If it is necessary to amend the proceedings by substituting the name of the Worthing Rural District Council for the East Preston Rural District Council, I will authorize the amendment accordingly.

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(1) Public Health Act, 1875, s. 13: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto,

Except

(1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders; and

(2.) Sewers made and used for the purpose of draining preserving or improving land under any local or private Act of Parliament, or for the purpose of irrigating land; and

(3.) Sewers under the authority of any commissioners of sewers appointed by the Crown,

shall vest in and be under the control of such local authority."

(2) (1895) 72 L. T. 389.

(3) [1900] 1 Q. B. 584.

(4) [1898] 2 Ch. 515.

(5) [1894] 2 Ch. 178.

(6) (1920) 124 L. T. 148.

(7) (1909) 73 J. P. 305.

The answer to the question as to the ownership of the sewerage system depends on whether the case falls within the main provisions of the Public Health Act, 1875, s. 13, or is within one or other of the exceptions specified in that section. The section provides: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto, Except (1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders"; then under sub-ss. 2 and 3 certain other sewers are specified and excepted, and the section continues: "shall vest in and be under the control of such local authority." Mr. Swords admitted that in order to succeed he must satisfy the Court that the case falls within the exception (1.) in the section and that he must prove that the sewers and works in question were constructed by the owner for his own profit or by a company for the profit of its shareholders.

What are the facts with regard to the construction of the sewers and works in this case? In the year 1912, a Mr. William Hollis acquired an estate of some twenty-five acres at East Preston, near Angmering. At the time of acquisition he already owned about one acre of land on the seashore, on which he had erected a bungalow. There was a rough track or road running along the seashore on the north side of this bungalow, joining the road to the Angmering Estate. This track or road was called Seaside Road, and there were then some four or five houses or bungalows built on one side or the other of it. There were some coastguard cottages and a few other cottages or houses on the land to the north, and a house

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called "Willowhayne," which afterwards became the Willowhayne Hotel. There was no common drainage system or water supply, each house or cottage being served by a cesspool and getting its water supply from a well. Mr. Hollis sub-divided the land, which he bought and called the Southstrand Estate, into building plots. Some of those fronting on the Seaside Road he sold, the purchasers building houses on them, and those houses were drained into cesspools and were supplied with water by wells. Mr. Hollis was anxious to have installed a proper system of drainage and water supply, and for this purpose he consulted a friend, who was the engineer to the Hendon Urban District Council. As the result of his consultation, he interviewed the solicitors whom he was employing at that time, and as he was anxious to prevent the sewerage system which he proposed to install from vesting in the local authority, he decided, in order to attain that end, with the advice of his solicitors, to form a company to operate the drainage for the estate and to supply the water to the houses to be built. The operations of the company were not to be confined to property bought by Mr. Hollis, or any future property which he might acquire in the district, but were to extend to property belonging to other persons than Mr. Hollis. Having determined on this course, Mr. Hollis began to construct a length of sewer in Seaside Road, with an outfall into the sea, consisting of a line of 9-inch pipes and a branch line from it up Sea View Avenue, a road then in course of construction. The actual pipe lines in existence at the date of the formation of the company are those shown by the unbroken red lines on the plan annexed to a lease of February 2, 1914, and made between Mr. Hollis as lessor of the one part, and the plaintiff company of the other part, and to which I will refer presently. During the hearing, a question arose as to when this pipe line was first used for the reception and disposal of sewage. I am satisfied from the evidence that it was not so used before the formation of the plaintiff company. Mr. Hollis gave positive evidence to this effect. A Mr. Leney, who was at the time in the employment of the East Preston Rural District Council stated that he saw sewage which had passed through the sewer emerging from the outfall into the sea before the company was formed, but after consideration of the documents produced by him and in the course of his cross-examination he quite frankly admitted that he might be mistaken in saying that the pipe line was in fact in use before the company was formed. Mr. Leney also admitted that the pipe line was not in use for the disposal of sewage until after the construction of the septic tank and filter bed. From the documents produced by Mr. Leney, I think there is little doubt but that the septic tank and filter bed were not in fact completed and not connected with the pipe line until after the company was formed. I have no hesitation in finding as a fact that the pipe line was not in use for the disposal of sewage until after the company was formed and was not in fact connected with any houses at that date.

The plaintiff company was incorporated on January 3, 1914. It had a capital of 3000*l*, divided into 3000 shares of 1*l*. each. The memorandum of association of the company stated that its objects were to enter into and carry into effect, with such modifications or alterations as might be agreed upon, an agreement already prepared and expressed to be made between Mr. Hollis of the one part and the company of the other part, a draft of which had been subscribed, with a view to identification, by a Mr. George William Finch, a solicitor. The objects included power to purchase and take on lease or acquire lands and buildings forming part or situate on the Southstrand Estate at East Preston or elsewhere, and " to provide for "—this is clause (C) of the memorandum—" and supply the said Southstrand Estate or any portion thereof or any other estate, city, town, village or place whatsoever, with a drainage system and drainage or sewage works, and for that purpose to lay mains, sewers, pipes, channels or drains," and so on ; I need not read the whole of the clause. The object stated under (D) was to supply the Southstrand Estate and the neighbourhood with a supply of water and to carry on the business of a waterworks company, and I do not think I need refer to any of the other objects. On January 15, 1914, the company entered into an agreement with Mr. Hollis, which is the agreement

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referred to in the memorandum of association. That agreement provided that Mr. Hollis should grant to the company and the company should take a lease of certain hereditaments and premises which were described in an indenture of lease which had already been prepared. The consideration for the grant of the lease was to be the sum of 2000*l.*, which was to be satisfied by the allotment and issue to Mr. Hollis or his nominees, of 2000 shares in the company credited as fully paid up, and by clause 3, it was provided that the company should within twelve months from the date of the agreement pay to the lessor the sum of 543*l.* 2*s.* 1*d.* in respect of the expenditure already made by him upon or in connection with certain works executed by the lessor upon the premises comprised in the lease.

Now the lease which was referred to in that agreement was executed on February 2, 1914. It is expressed to be made between Mr. William Hollis, who was called the lessor, of the one part, and the plaintiff company of the other part, and it reads: " Witnesseth that in consideration of the sum of 2543*l.* 2*s.* 1*d.* and of the rent and covenants hereinafter reserved and contained and on the part of the company to be paid observed and performed the lessor doth hereby grant and demise unto the company All that piece or parcel of land situate on the Southstrand Estate, East Preston aforesaid coloured pink on the plan attached hereto Together with the rights liberties and privileges following so far as the lessor is able lawfully to grant the same (that is to say) Full power and authority to and for the company to sink a well or wells thereon and take use and enjoy all the water issuing therefrom and to convey the same water to any lands tenements or hereditaments on the said Southstrand Estate which is shown on the said plan and thereon coloured blue and on the land adjoining or adjacent to the said estate on the north over which the lessor now has an option to purchase (hereinafter referred to as ' the option land ') and on other land in the vicinity " ; and then there is a power to lay down and construct levels and so on. That is all connected with the supply of water and I need not refer to that in any further detail. Then there is " power and authority to make or construct under the land coloured green on the said plan and during the term hereby granted maintain bacteria beds or septic tanks for the treatment of sewage and any engines machinery and other works or appliances which may be deemed necessary or proper in connection therewith and also to lay down construct or make in under or through such land manholes in connection therewith And for the purposes aforesaid and for the purpose of examining and repairing or relaying such bacteria beds or septic tanks and manholes full power for the company their agents or workmen with or without motor vehicles carts or horses to enter upon the lands or grounds of the lessor shown or indicated as roads and upon the said land coloured green on the said plan and also full power and authority to provide a system of drainage for the said Southstrand estate and the option land and other land in the vicinity And for that purpose to have the free running of water and soil through any mains sewers drains culverts and pipes or other similar works and the use of any manholes in connection therewith at present in under or through any of the lands or grounds of the lessor forming part of the said Southstrand Estate or any part thereof the position of which is indicated on the said plan "—those are the pipe lines which were already in existence ; there are some indicated on the plan by broken red lines which were in course of construction. Then it continues : " and to lay down construct or make on such lands and either upon above or below the surface of the said lands mains sewers drains culverts pipes and manholes or other similar works in under or through any of the said lands or grounds of the lessor shown or indicated as roads with all necessary branches or connections between the same and any lands buildings tenements and hereditaments on the said Southstrand Estate and the option land," and then there is the necessary power for examining, repairing and relaying. The lease also provides that all of those rights and privileges and the piece of land conveyed are to be held by the company from September 29, 1913, for the term of ninety-nine years, the company paying a rent of 20*l*. a year for the right that they had obtained. There are covenants by the company to pay the rents and to pay the rates and so on, and a covenant by the company that during the term thereby granted " if and whenever thereunto required by the lessor or any of the tenants or occupiers of the said Southstrand Estate or the option land permit or allow the drainage from all or any houses cottages factories or other messuages buildings or erections to pass or be carried into and through the said main sewers drains culverts and pipes to be laid down constructed or made by the company under the powers hereinbefore conferred or contained the lessor or such tenant or occupier aforesaid bearing and paying for the costs and expenses of laying down all branch drains or pipes and of executing all work necessary for connecting the said houses cottages factories or other messuages buildings or erections with the said main sewers drains culverts and pipes such sum as the company may from time to time require and also bearing and paying the costs and expenses of keeping in repair all such branch pipes or drains and of maintaining all works necessary for such connection and also paying to the company a drainage rate or rent for the privileges aforesaid not exceeding without the consent in writing of the lessor first had and obtained a sum equal to ten per cent. of the rateable value of the premises enjoying such privileges and also entering into an agreement with the company in such form as the company may from time to time require And further that the company will on the lessor giving to them three calendar months' notice of his intention to make on the said Southstrand Estate or the option land any new road or roads in addition to the roads already in existence thereon and indicating in such notice the exact position and extent of such new road or roads," the company was then to lay down construct or make the necessary pipes sewers and so on, and then there is a proviso for re-entry.

The document is a lease by the owner of the estate of the right or privilege of making sewers on the land for the purpose of supplying a drainage system, among other things, for a period of ninety-nine years. The consideration to be paid for that right by the company was a sum of 2543*l*. 2*s*. 1*d*. and an annual rent. After the lease was executed, 2000 shares in the company, part of the consideration under the agreement and the lease, were duly allotted; 1500 of those shares were allotted to Mr. Hollis and 500 of them to Mr. G. W. Finch, who was a partner in the firm of solicitors acting for Mr. Hollis. These last mentioned shares were given to Mr. Finch by Mr. Hollis for his own absolute use and benefit, and Mr. Finch was in no sense a trustee of them for Mr. Hollis or anyone else; indeed he subsequently sold them to another gentleman for some 300*l*.

After the formation of the company it was financed by Mr. Hollis; the sewerage system and water supply were proceeded with and the work was done by a staff of workmen employed by a company called the Angmering-on-Sea Estate Co., Ld., which was also formed by Mr. Hollis for the development of the estate. The cost of this work was defrayed either by the Angmering-on-Sea Estate Co., Ld. or by Mr. Hollis, but the plaintiff company was debited with the proper proportion of that cost. Ultimately Mr. Hollis acquired further property in the district, and leases were entered into with the plaintiff company conferring on it similar rights to construct and lay sewers and supply water to houses and cottages to be erected on these further plots. The plaintiff company also entered into an agreement to provide a sewerage system for property in the district which did not belong to Mr. Hollis. I need not refer to any of these documents in detail, except to a deed dated December 3, 1920, made between Mr. Hollis and his mortgagee, and Angmering-on-Sea, Ld. and its mortgagees and the plaintiff company. That deed conferred on the plaintiff company the right to lay and maintain pipes similar to that conferred by the lease which I have already read. The only reason I refer to it is that it is stated in a recital in that document that Mr. Hollis had, with the consent of one Richard Joseph Sharp, owner of the land coloured red on the plan annexed thereto and Angmering-on-Sea, Ld. constructed a roadway, which is shown on the plan and coloured dark blue, dark red and dark green, "with sewers drains and pipes thereunder to the satisfaction of the said Richard Joseph Sharp and

Angmering-on-Sea Limited." I am satisfied by the evidence that the cost of laying the particular sewers which are referred to in that recital was debited to the plaintiff company. As I said, the plaintiff company also entered into agreements with persons other than Mr. Hollis, who had property adjoining outside the Southstrand Estate. The document I am referring to is a lease dated October 15, 1924, made between a Mr. Spyers and a Mr. Aron, of the one part, and the plaintiff company, of the other part, and that again grants and demises to the company the power and authority to lay down and construct and maintain sewers and drains and pipes, with the same kind of provisions as are contained in the lease to which I have referred. After the sewerage system had been installed, any person wishing to use it was required to enter into an agreement with the plaintiff company, and which agreement provided that the user should pay for the privilege—in addition to the cost of connecting his house with the system—an annual rate of a fixed amount, bearing a definite relationship to the value of the user's property, and these rates have been collected for and credited to the plaintiff company throughout I think the whole period of its existence. In the early days these rates were collected by Messrs. Fladgate & Co. and afterwards, I think, they were collected by a gentleman who was appointed for that purpose by the plaintiff company. Mr. Hollis in the first instance financed the company, and early in its history the plaintiff company issued to Mr. Hollis debentures for 1600*l*. in respect of the moneys so advanced by him to the company. When the debentures were issued, an account was prepared and Mr. Finch, the solicitor for the company, stated that he was himself satisfied that the amount of 1600*l*. was due to Mr. Hollis. Of the sixteen debentures for 100*l*. each which were issued to Mr. Hollis, five were transferred by him to a Mr. Dods. Ultimately there was a new issue of debentures to a total amount of 4000*l*.; twenty-nine of these were issued to Mr. Dods and eleven to Mr. Hollis, the eleven to Mr. Hollis being issued in consideration of his releasing the other debentures. Mr. Dods paid for his twenty-nine debentures by surrendering the original five debentures transferred to him and by paying off the plaintiff company's overdraft with its bankers, and by certain other payments in account. Ultimately, a further issue of 4000*l.* debentures was made.

A great deal of the cross-examination of the plaintiff's witnesses and the evidence in-chief of some of the defendant council's witnesses was directed to establishing that the plaintiff company and its directors, including Mr. Hollis, had carried on the affairs of the company with considerable irregularity; but the one fact which emerges with the greatest clarity from the evidence is that the plaintiff company was a separate entity from Mr. Hollis. Indeed, Mr. Scholefield admitted this with the utmost candour, but he argued that the irregularities showed that Mr. Hollis was able to do what he wished with the company and that the company must be deemed to have acted in their relationship to the sewerage system as Mr. Hollis's agent. I fail to see any ground on which to base such a conclusion. The company was a separate entity so far as the sewerage system was concerned. The cost of the work done in respect of it was duly apportioned and debited to the plaintiff company, and the whole or at least a substantial part of such cost was paid or accounted for by the plaintiff company. Again I have no hesitation in holding that the sewerage work was executed for and on behalf of the plaintiff company.

It was argued however that such a finding could not be made, so far as the line of pipes is concerned which was in existence when the company was first formed. That line was made by Mr. Hollis as I hold with the intention of transferring it to the company which he then intended to form, and was in substance transferred to the company before it constituted a sewer, for nothing was connected to it until after its transfer; nor was it in use before the date of the lease of February 2, 1914.

It is necessary therefore to consider the question: Were the sewers made for profit? It is well settled that "if a landowner, merely for the benefit of his estate, or for the benefit of his tenants, puts in a system of drainage, he cannot, on those facts alone, say that he made his drainage system or his sewers for his own profit, because the profit that is referred to by the Act of Parliament is not that interest, advantage, or gain which may come to a landowner who improves his property by draining by reason of his houses which are drained improving in value or receiving thereby a higher letting value." That passage is from the judgment of Romer J. in the case of *Minehead Local Board* v. *Luttrell*. (1) In that case the learned judge went on to point out the distinction between the facts in that case and the facts in the earlier cases to which he was referring. He pointed out that in the case of *Acton Local Board* v. *Batten* (2), the only fact which had to be dealt with was the making of the sewer and that the owner had there stated on oath in the witness-box that he had not made it for profit, but the essential fact was that there was nothing but the making of the sewer on which to come to a conclusion. He referred also to the case of *Ferrand* v. *Hallas Land & Building Company* (3), and in that case again he pointed out that the landowner put in the sewers for the sole purpose of draining houses erected by him on his own land, and that that was the only fact that was available for consideration. But it is plain from that decision of *Minehead Local Board* v. *Luttrell* (4) that a sewer, even though it has been constructed for sanitary purposes, may be a sewer for profit.

My attention has been called to a number of cases, and sentences have been extracted from them which, taken by themselves, would seem to support the contention that if a sewer is constructed with the object of meeting the sanitary requirements of the dwelling-houses to be served by it, then the sewer cannot be said to have been made for profit ; and that to bring such a sewer within the exception to s. 13 of the Public Health Act, 1875, it is necessary to prove that it was constructed for some purpose other than a sanitary one—namely, to enable the maker of the sewer to collect and utilize the matter passing through it. Mr. Scholefield read and relied upon the following passage in the judgment of

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(1) [1894] 2 Ch. 178, 181.

(2) (1884) 28 Ch. D. 283.

(3) [1893] 2 Q. B. 135.

(4) [1894] 2 Ch. 178.

Collins L.J. in the case of *Sykes* v. *Sowerby Urban District Council* (1): "It seems to me that there may be a very fair distinction taken, which will make the Act intelligible,"—that is the Act I am considering—" and that where the instrument used, being a drain, is primarily used for the main purposes of the Act, sanitation and getting rid of fæcal matter, that is within the Act, although, indirectly, it also brings about a benefit, which might be described as profit, to the person who uses it. But where a drain is made for the purpose of improving the land of the person who makes it—where that is the ordinary purpose of it—then I think that may be described as the direct object of making the drain, and not as a secondary incidental result. I think that there may be a broad distinction between drains made for sanitary purposes and drains made for the mere beneficial occupation of land, and, if that qualification is read into the exception here, I think it may make the whole Act intelligible, and enable us to take out of the Act what otherwise, I think, would be in it, namely, that large class of drains which are made with no sort of reference to sanitary purposes, but are made by the owner of the land for the better enjoyment of his own land."

If you read that passage by itself, it appears that Collins L.J. is saying that if a drain is made for a sanitary purpose it cannot be within the exception to this Act, but if it is made for some other purpose it is. What I think the learned Lord Justice is dealing with there is exactly what Romer J. was dealing with in his general statement of the law in the *Minehead* case. (2) What he is saying is, in the absence of any other fact, that is the way in which the Act should be applied ; he is not saying that if other facts are present the Act must be so construed, and I think that is really made clear from what follows in the judgment, namely, " Now, what difference does it make, if one has got so far, whether the profit is obtained in actual money, by selling the right to use the drain, or by selling that which is got out of the drain ? It seems to me there is no difference in

(1) [1900] 1 Q. B. 584, 592, 593. (2) [1894] 2 Ch. 178.

principle, but only a different way of getting at the profit. In fact, I do not think there is a better illustration of what I mean by the direct and the indirect result than the case decided by my brother Romer—*Minehead Local Board* v. *Luttrell.* (1) There the drains were made by the owner for the purpose of dealing with fæcal matter merely as a part of the machinery whereby he secured a profit for himself; . . . ."

It should be noticed that Collins L.J. is pointing out there that the drains were drains for sanitary purposes, so that if the former passage were to have the wide meaning for which Mr. Scholefield has argued, he would be saying something directly opposed to it in that sentence. The object for which the sewers in the *Minehead* case (1) were constructed was purely sanitary and if Mr. Scholefield's argument is right, I think Collins L.J. must necessarily have disapproved of the *Minehead* decision. (1).

I think the cases show that it is a question of fact in each case, whether a particular sewer has been made for profit or not; and that it is not a sufficient ground for holding that the making was for profit if the only available evidence is that the sewers were made by one who was developing a building estate in the course of that development and in order to provide sanitary facilities for houses to be erected on it.

In the present case the right to construct the necessary sewers was sold to a company having an entirely separate entity. The object of the company in purchasing the rights must necessarily have been to turn those rights to account and make a profit from so doing. So far as that company is concerned in my judgment the only possible answer to the question: Were the sewers made for profit is in the affirmative. I therefore hold that the plaintiff company's contention that the sewers are within the exception to s. 13 of the Public Health Act, 1875, is correct.

In the result I hold that the sewers and works in question are not vested in the defendant council, and I make a declaration to that effect.

(1) [1894] 2 Ch. 178.

The defendant council must pay the plaintiff company's costs.

Solicitors: *Thomas Eggar & Son, for J. K. Nye & Donne, Brighton*; *Arthur C. Dowding, for J. W. Calvert, Littlehampton.*

A. R. T.

BENNETT J.
1933
Nov. 22.

In re HARDING.

WESTMINSTER BANK LIMITED *v.* LAVER.

[1933. H. No. 2306.]

Lunacy—Undivided three-fourths share in settled freehold property sold in 1923*—Death of Lunatic after* 1926*—Intestacy—Devolution of proceeds of Sale—Lunacy Act,* 1890 (53 *Vict. c.* 5), *s.* 123, *sub-s.* 1*—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 51, *sub-s.* 2*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV.*

A testatrix made a will in 1877 and was subsequently in that year found to be of unsound mind. She remained in that condition until her death in 1932. At her death all the persons who would have been interested under her will were dead, with the result that her property (which included the proceeds of sale of an undivided three-fourths share in certain freehold land) devolved as under an intestacy. Her share in the freehold land had been sold in 1923. A summons was taken out by her administrator for the determination of the question whether the proceeds of the sale of the property devolved upon her heirs at law or upon her next of kin.

Held, that the capital devolved upon the heirs at law under s. 123, sub-s. 1, of the Lunacy Act, 1890, and was not affected by the transitional provisions of the Law of Property Act, 1925, but fell within the exceptions provided for by s. 51, sub-s. 2, of the Administration of Estates Act, 1925; and that with regard to the dividends, so much thereof as had accrued before the death of the testatrix devolved upon the next of kin as personal property, and so much thereof as had accrued since her death devolved upon the persons who became entitled to the real estate.

Originating Summons.

A testatrix, who was found to be of unsound mind in 1877 and who remained in that condition until her death in 1932, was absolutely entitled to an undivided three-fourths share in a settled piece of freehold land. She made a will in 1877, but, as all the beneficiaries under the will had predeceased her, she died intestate. In 1923 the Master in Lunacy adopted a conditional contract for the sale of her share in the land, and her share was sold, the proceeds of the sale being lodged in Court. Doubts having arisen with regard to the devolution of the proceeds of sale having regard to the provisions contained in s. 123, sub-s. 1, of the Lunacy Act, 1890, in Part IV. of the First Schedule to the Law of Property Act, 1925, and in s. 51, sub-s. 2, of the Administration of Estates Act, 1925, a summons was taken out by the administrator with the will annexed of the estate of the testatrix for the determination of the question (inter alia) whether in the events which had happened the sums of 2185*l.* 12*s.* 3*d.* 3½ per cent. Conversion Stock and 85*l.* 1*s.* 11*d.* cash, representing the proceeds of sale, (*a*) ought to be distributed among the persons who at the death of the deceased were her heirs at law under the law in force immediately before January 1, 1926, or (*b*) whether the same ought to be distributed among the persons who upon the death of the said deceased became entitled under the Administration of Estates Act, 1925, to her personal estate.

B. G. Burnett-Hall for the applicant.

Harold Christie for one of the heirs at law. The question depends on the effect of two statutes. Sect. 123, sub-s. 1, of the Lunacy Act, 1890, deals with sales. The fund in Court has not been applied under the powers conferred by that statute, but is still retained. The sale was made under those powers. The fund represents the proceeds of sale of the lunatic's real estate. In so far as the money has not been spent it is of the same nature as the property sold. He also referred to s. 51, sub-s. 2, of the Administration of Estates Act, 1925.

H. F. Parshall for one of the next of kin.

On the passing of the Law of Property Act, 1925, the lunatic no longer had any beneficial interest in the land—see Sch. I., Part IV. The property in question must be regarded as not having been sold at all, and as having, in 1926, become personalty.

The provisions of s. 51, sub-s. 2, of the Administration of Estates Act, 1925, apply. At the time when that statute came into operation this lunatic was "living" and of "full age." When the lunatic died she was not entitled to any beneficial interest in real estate, because such beneficial interest as she would have had was destroyed by the transitional provisions of the Law of Property Act, 1925. The passing of that Act could have no bearing on this property of the lunatic, because, when that statute was passed, it was not land but the proceeds of sale of land. There is now no such thing as a legal estate in an undivided share of land.

Harold Christie in reply. The transitional provisions of the Law of Property Act, 1925, have no operation on property of this sort, but only on the land itself. One fourth of the estate is held by some one else. Part IV. can only act upon an entirety. The case is simply not provided for in Part IV.

BENNETT J. This is a curious point. The testatrix with whose estate I am concerned made a will in 1877, and in the same year she was found to be of unsound mind, and she remained in that condition from the end of 1877 until she died in 1932. When she died all the persons to whom she had left her property by her will had predeceased her, with the result that she died intestate.

Now it happened that she was absolutely entitled to a three-fourths share in a settled piece of freehold land, and in August, 1923, the Master in Lunacy adopted a conditional contract for the sale by the lady of her share in that piece of land, and under that contract her share was sold and the proceeds of sale were lodged in Court to the credit of an account headed "Real Estate Account," and invested ultimately in 2313*l.* 18*s.* 3½ per cent. Conversion Stock, of which a small part was sold and of which there remained when she died 2185*l.* 12*s.* 3*d.*

The question which is asked by this summons is as follows: [His Lordship read the question and continued:] The answer to that question depends on the construction and effect of s. 123 of the Lunacy Act, 1890, s. 51, sub-s. 2, of the Administration of Estates Act, 1925, and Part IV. of the First Schedule of the Law of Property Act, 1923.

Sect. 123 of the Lunacy Act, 1890, reads as follows: [His Lordship read the material part of the section and continued :]. The purpose of the section is, I think, to preserve the character of the property, i.e., to provide that the proceeds of sale of real estate are to be regarded as real estate. That is what I think is meant by the provision "the surplus moneys shall be of the same nature as the property sold."

The effect, therefore, of s. 123, is that the 2185*l.* 12*s.* 3*d.* Conversion Stock is to be regarded as if it were real estate.

The Administration of Estates Act, 1925, entirely alters the devolution of real estate upon an intestacy, and the lady with whose estate I am concerned at the moment died intestate. But s. 51 excepts from the operation of the Act the beneficial interests in the real estate of a lunatic, the exception being stated in these terms in sub-s. 2 of that section. [His Lordship read the sub-section and continued :]

Mr. Christie, representing one of the heirs at law of the lady, contends that by virtue of the operation of s. 123 of the Lunacy Act, 1890, and of the provisions of sub-s. 2 of s. 51 of the Administration of Estates Act, 1925, the Conversion Stock is to be regarded as real estate in which the testatrix had at her death a beneficial interest and, accordingly, that it is within the exception of sub-s. 2 and devolves upon the persons who would have been entitled to it under the general law in force before January 1, 1926.

Mr. Parshall, who represents one of the next of kin, contends that that argument has no foundation because by virtue of the transitional provisions in Part IV. of the First Schedule of the Law of Property Act, 1925, the interest of the deceased had been converted into personalty and was held upon trust for sale, so that there was no beneficial interest in real estate to which the deceased was entitled on January 1, 1926, which could fall within the exception mentioned in sub-s. 2 of s. 51; and that she was only entitled to an interest in personal estate, which therefore devolved in accordance with the provisions of the Administration of Estates Act, 1925.

The reply to that argument is that on January 1, 1926, there was no undivided interest in real estate to which the deceased was entitled upon which the transitional provisions of the Law of Property Act, 1925, could operate. All there was at that date was the sum of 2185*l.* 12*s.* 3*d.* Conversion Stock in Court which, under s. 123 of the Lunacy Act, 1890, was to be regarded as land and in which stock, which is the only property in question, there were no undivided interests at all, the deceased being entitled to the entirety.

On the whole, the conclusion at which I have arrived is that the argument advanced on behalf of the heirs at law is to be preferred to that advanced on behalf of the next of kin.

The argument on behalf of the next of kin necessarily involves, as it occurs to me, that when the Law of Property Act, 1925, came into force the Conversion Stock representing the proceeds of sale of the interests of the testatrix in the land in question was property in which not merely the testatrix but some other person or persons had interests: in other words that there were co-owners of the Conversion Stock. Otherwise there would be no property upon which Part IV. of the First Schedule to the Law of Property Act, 1925, could operate.

It is plain that the testatrix was the only person interested in the Conversion Stock and it follows, therefore, that in my judgment Part IV. of the Schedule did not operate upon it.

The result is that, in my judgment, there was in January, 1926, a beneficial interest in real estate, to which the testatrix was entitled, which fell within the exception in sub-s. 2, of s. 51 of the Administration of Estates Act, 1925.

In my judgment the first question should be answered by saying that the Conversion Stock in question ought to be distributed among the persons who at the death of the testatrix were entitled to the real estate of which she died intestate under the law in operation before January 1, 1926. With regard to the cash, the amount in respect of dividends which accrued before her death devolves upon the next of

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kin as personal property, while that which accrued since her death devolves upon the persons who became entitled to the real estate.

Solicitors: *Badham, Comins & Sloman, for Batten & Co., Yeovil; Robins, Hay & Waters.*

J. L. D.

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RUSSIAN AND ENGLISH BANK *v.* BARING BROTHERS AND COMPANY, LIMITED.

[1921. R. 806.]

Company—Procedure—Russian bank with London branch—Dissolution of bank by Soviet law—Stay of action—Plaintiff non-existent—Liquidation of London branch—Motion to remove stay of action—Action not revived by liquidation—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 2.

A Russian banking company, which had established a business in England, was dissolved by Soviet law before the coming into operation of the Companies Act, 1929. The company was the plaintiff in an action which was stayed in 1932 by an order of the Court, the plaintiff company being treated as having been dissolved. A compulsory winding-up order was subsequently made under s. 338 of the Companies Act, 1929:—

Held, that s. 338, sub-s. 2, of the Companies Act, 1929, did not operate to revive the plaintiff for the purposes of the action to which an end had been put by the order of the Court or to avoid the dissolution brought about by the foreign law.

Russian and English Bank v. *Baring Brothers & Co.* [1932] 1 Ch. 435 and *In re Russian and English Bank* [1932] 1 Ch. 663 referred to.

MOTION.

The Russian and English Bank, which was incorporated under the laws of Russia in 1910, and which established a business in England in 1915, was dissolved by the laws of Russia before the coming into operation of the Companies Act, 1929. In 1921 an action was brought to recover two sums of 100,000*l.* and 80,000*l.*, alleged to be money of the plaintiff bank in the hands of the defendants. In *Russian* *and English Bank* v. *Baring Brothers & Co.* (1) an order was made to stay the action, the plaintiff bank being treated as having been dissolved. As a result of the observations contained in the judgment a petition was presented for the compulsory winding-up of the company (*In re Russian and English Bank* (2)), and a compulsory winding-up order was made. An application by motion, under the liberty to apply given to the parties in the action, was made by the plaintiff bank for an order that the stay of all further proceedings in the action directed by the order of Eve J. dated January 12, 1932, be removed.

Sir Albion Richardson K.C. and *H. Wynn Parry* for the plaintiff bank. Having regard to the order of Eve J. in *Russian and English Bank* v. *Baring Brothers & Co.* (1) the contention that the plaintiff company had been destroyed by Soviet legislation became established. There is, however, a plaintiff now, as the bank has been reborn in consequence of the winding-up proceedings.

[They referred to *Lazard Bros. & Co., Ld.* v. *Midland Bank, Ld.* (3), and *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (4)]

Gavin Simonds K.C. and *A. Andrewes-Uthwatt* for the defendant bank. There is, apart from s. 338, no case to answer. That section does not go so far as to show how an action which is dead can be revived.

C. Stafford Crossman for the Attorney-General.

BENNETT J. This is a motion, in an action by the Russian and English Bank against Baring Brothers & Co., Ld., and His Majesty's Attorney-General, by the plaintiffs for an order that the stay of all further proceedings ordered therein by the order of Eve J. of January 12, 1932, be removed or that such further or other order may be made or directions given in the premises as the Court may deem expedient.

The motion is made in this action, which was begun by a writ issued on March 23, 1921, by which the plaintiffs claimed a declaration that they were assignees of two sums of 80,000*l.* and 100,000*l.* respectively, forming part of a special account held by Baring Brothers & Co., Ld., and to have administration of those sums and all necessary accounts and inquiries.

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(1) [1932] 1 Ch. 435.
(2) [1932] 1 Ch. 663.
(3) [1933] A. C. 289.
(4) [1925] A. C. 112, 149.

The plaintiffs were incorporated in the year 1910 in Russia under the Russian law, and in 1915 they established a branch of their business in this country. There was legislation in Russia, the effect of which (as the Courts of this country have decided) brought about a dissolution of the plaintiffs, and in the year 1931, upon the footing that there were no plaintiffs, the defendants, Baring Brothers & Co., Ld., made an application in the action which came before Eve J. on January 12, 1932. On that application Eve J. made an order that all further proceedings in the action be stayed and gave the parties liberty to apply.

It is under that liberty to apply that the present application is made.

It is perfectly clear from the judgment of Eve J. that the ground upon which he made his order was that there were no plaintiffs before the Court. On March 8, 1932, under the provisions of s. 338 of the Companies Act, 1929, I made an order for the winding-up of the plaintiffs, and the foundation of the present application is a suggestion that the making of the winding-up order has revived the company and made the dissolution of the company void; and, the company having once more come into existence, it is suggested that it would be right in the exercise of the discretion of the Court to remove the stay directed by Eve J. and to allow the action to continue.

In my judgment, from the moment when Eve J. made his order in January, 1932, the action in which the present motion is made was dead—dead, because there was no plaintiff to maintain it; and I can see nothing in the language of s. 338 which reanimates the plaintiff or avoids the dissolution brought about by the foreign law. Therefore there is to-day no action in which the present application can be made. It is dead for all purposes. That is all that it is necessary for me to say to dispose of the present application.

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I dismiss the motion with costs.

Solicitors: *F. M. Guedalla & Co.; Bischoff, Coxe, Bischoff & Thompson; Treasury Solicitor.*

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CLAUSON and LUXMOORE JJ.
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Oct. 27, 30.

In re A DEBTOR.

[No. 29 of 1931.]

Bankruptcy—County Court—Practice—Solicitor—Signing the Roll—Costs—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *ss.* 2, 27—*Solicitors Act*, 1860 (23 *&* 24 *Vict. c.* 127), *s.* 26—*Bankruptcy Act*, 1861 (24 *&* 25 *Vict. c.* 134), *ss.* 3, 4, 212—*Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 59, 70—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 3, 87—*Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 9—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 93, 151—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 164—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 132, *sub-s.* 1; *s.* 152—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 99, *sub-s.* 6; *s.* 215, *sub-s.* 1—*Solicitors Act*, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 43, 44—*County Court Rules*, 1903–1932, *Order* LIV., *r.* 7.

An admitted solicitor of the Supreme Court has a statutory right to practise in the County Court when it is exercising its bankruptcy jurisdiction and may therefore do so without signing the roll of the Court, as required by Order LIV., r. 7, of the County Court Rules, 1903–32.

APPEAL of petitioning creditors from the Brentford County Court.

On October 22, 1931, a petition in bankruptcy for a receiving order founded upon non-compliance with a bankruptcy notice to pay certain taxed costs amounting to 60*l.* 18*s.* 6*d.* was presented by the Heston and Isleworth Urban District Council and served upon the debtor. The petition came on for hearing before the Brentford County Court and was adjourned in order to give the debtor further time to pay to the petitioning creditors the said debt and their costs of the petition. On January 11, 1933, when the petition came on again for further hearing, the debtor paid the said debt to the petitioning creditors (who in the meantime had been constituted a borough by royal charter) which they accepted subject to the condition that, if the petitioning creditors' costs of the bankruptcy proceedings were not paid and a receiving order was made, the money so received should be paid into court and dealt with as part of the debtor's estate; and the further hearing of the petition was again adjourned and it was ordered that in the meantime the petitioning creditors' costs should be taxed and paid by the debtor.

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On January 23, 1933, their bill was, in due course, brought before the Registrar, when the debtor took a general objection to all the items of the bill on the ground that the petitioning creditors' solicitor had not signed the roll of solicitors in the Brentford County Court and that in those circumstances he was not qualified to practise in that court and was, consequently, not entitled to claim any costs of so practising.

On March 16, 1933, the matter was brought before the county court judge, when his Honour Judge Higgins ordered and adjudged that the objections against the bill were sound on the ground that under ss. 2 and 27 of the Solicitors Act, 1843, and s. 26 of the Solicitors Act, 1860, and ss. 43 and 44 of the Solicitors Act, 1932, a solicitor must sign the roll of a county court in order to entitle him to practise in that court and that, as the petitioning creditors' solicitor had not signed the roll before the costs were incurred, he was not entitled to recover any costs of the petition; and, accordingly, his costs were disallowed.

S. R. Sidebottom for the petitioning creditors, the appellants. The Solicitors Acts do not apply to this matter at all; because (*a*) the proceedings are in bankruptcy and (*b*) because in any event the County Courts Acts and the rules thereunder apply to county courts as at present constituted and the inferior courts referred to in the Solicitors Acts were quite different from the county courts of the present day. As to (*a*): By the Bankruptcy Act, 1861, ss. 3, 4, there was conferred upon the judges of county courts, within their respective districts, the jurisdiction in bankruptcy which was vested in the Commissioners of the District Courts of Bankruptcy and by s. 212 of the same Act, a solicitor is authorized to practise, appear and plead in the county court. By the Bankruptcy Act, 1869, s. 59, county courts were to be local courts of bankruptcy, and by s. 66 the judges of those local courts were to have, in addition to their ordinary powers as county court judges, the jurisdiction of a judge of the High Court of Chancery, and by s. 70 attornies and solicitors of the Superior Courts were authorized to practise in the Court of Bankruptcy.

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The Bankruptcy Act of 1869 was repealed by the Bankruptcy Act of 1883; but by s. 151 of the latter Act a solicitor's right of audience in a court of bankruptcy was preserved: and by s. 152 of the Bankruptcy Act, 1914, his right of audience again was preserved: *Ex parte Reynolds.* (1) As to (*b*):—By the Solicitors Act, 1843, s. 2, it was provided that no person other than a solicitor duly admitted and qualified under the Act and on the roll should carry on proceedings in the county court: the roll is defined by s. 1 of the Solicitors Act, 1860, as the roll which the Registrar of Attornies and Solicitors was required to keep. By s. 27 of the Solicitors Act, 1843, a person who had been admitted an attorney of any one of the superior courts of law at Westminster was entitled to be admitted an attorney in any inferior court of law, but only on signing the roll of that court, and a person who had been admitted a solicitor of the High Court of Chancery was entitled to be admitted a solicitor of any inferior court of equity and in the Court of Bankruptcy, but only on signing the roll of that court. That section is merely declaratory of the right of an attorney or solicitor to practise in an inferior court to which admission has previously thereto required: the Solicitors Act, 1932, s. 44, was also declaratory and provided that a qualified solicitor might practise in the Supreme Court and, upon signing the roll of solicitors of any inferior court which kept such a roll, in that inferior court: but nothing in that Act was to affect any enactment in force restricting the right of a solicitor to practise in any court; or to affect any right of practising or being heard in any court which before the Act was enjoyed by virtue of any enactment, rule or by custom or otherwise by persons qualified to act as solicitors. Sect. 27 of the Solicitors Act, 1843, did not apply to the county court, because it was not until 1846 that county courts, as now constituted, were established, and the inferior courts referred to in s. 27, of which there were many, could not include the county court sitting in bankruptcy. The result of ss. 92, 93, 100, 102, sub-s. 2, of the Bankruptcy Act, 1883, is that a county court judge sitting in bankruptcy is in a similar position to that of a judge of the High Court exercising his jurisdiction: *Skinner* v. *County Court Judge of Northallerton.* (1) Further, by s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, it was apparently considered necessary to expressly provide that an "Inferior Court" included a county court as well as any other inferior court.

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(1) (1885) 15 Q. B. D. 169.

Admission before practising in a county court is nowhere required by any of the County Court Acts. By s. 72 of the County Courts Act, 1888, solicitors are given an unrestricted right of audience in county courts which must include the right to practise: see the marginal note, "Persons qualified to practise before courts." Further, many things can be performed through the post-office in accordance with the rules. That is inconsistent with a requirement to sign the roll before practising. It is submitted that even if the provisions of the Solicitors Acts would otherwise apply to county courts as now constituted, the last mentioned section impliedly repeals those provisions. Order LIV., r. 7, of the County Court Rules 1903–32, which provides that no solicitor be allowed to appear in a court, until he has signed a roll to be kept for that purpose by the Registrar, is only a precautionary measure against an unqualified person or uncertificated solicitor appearing in court. It may be that this rule is ultra vires: but however that may be, the rule does not derogate from the rights given by s. 72 to solicitors to practise in the county court. Rule 7 of Order LIV. is directed to the judge rather than to solicitors, and if the judge should allow a solicitor to appear he must thereby waive the requirement to sign a roll. Further, by r. 24 of the same Order, a breach of the rules does not render the proceedings void: *Norris* v. *Bailey* (2); *Mason* v. *Grigg.* (3) Here, the debtor took a fresh step, after knowledge of what he believed to be an irregularity and did not apply to have set aside the order made against him for payment of costs. He did not raise the point until taxation: see r. 25 of the Order LIV.

Cecil Bennett for the respondent. Sects. 2 and 27 of the Solicitors Act, 1843, make it essential that a solicitor should, before practising in any of the inferior courts of law or equity or in the Court of Bankruptcy, sign the roll of that court. Sect. 27 names the Court of Bankruptcy and must have included the district courts then exercising bankruptcy jurisdiction. In the *Queen* v. *Mayor of London* (1) it was held that the Mayor's Court was an "inferior court" within s. 2 of that Act, and that an attorney duly admitted to one of the superior courts of law at Westminster was entitled to be admitted to practise in the Mayor's court on signing the roll of that court. It is subject to the conditions imposed by the Solicitors Act, 1843, that a solicitor is entitled to practise in a county court sitting in bankruptcy as now constituted. By s. 70 of the Bankruptcy Act, 1869, an attorney or a solicitor of a superior court was authorized to practise and have audience in the Court of Bankruptcy and in the London Court of Bankruptcy. By s. 26 of the Solicitors Act, 1860, a solicitor who had not complied with the requirements of the Act of 1843 was disabled from suing for his fees. By s. 1 of the Bankruptcy Act, 1861, the Court of Bankruptcy was invested with the powers and jurisdiction of the superior courts of law and equity; and by s. 212, every solicitor of the High Court of Chancery who had been admitted a solicitor of the Court of Bankruptcy was authorized to practise in that court or in any district court and to appear and plead. And by s. 70 of the Bankruptcy Act, 1869, a right to practise and a right of audience in the Court of Bankruptcy and in the London Court of Bankruptcy was actually conferred upon a solicitor. That section, however, was repealed by s. 169 of the Bankruptcy Act, 1883, and s. 151 of that Act expressly preserved only the right of audience in bankruptcy matters in the High Court.

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(1) [1898] 2 Q. B. 680, 684; [1899] A. C. 439.

(2) (1893) 62 L. J. (Q. B.) 338.

(3) [1909] 2 K. B. 341.

[CLAUSON J. referred to s. 87 of the Judicature Act, 1873.]

Latham v. *Hyde* (2) was also referred to, a case in which an attorney had acted in contravention of the statute of 1729; 2 Geo. 2, c. 23, s. 1, and it was held that an attorney who practised in a court in which he had not been entered was not entitled to maintain an action for his fees.]

Cur. adv. vult.

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(1) (1847) 13 Q. B. 1, 28, 29.

(2) (1832) 1 Dowl. 594.

July 24. Clauson J. delivered the following written judgment :—The judgment I am about to read is the judgment of the Court (Clauson and Luxmoore JJ.).

On January 11, 1933, while a petition for a receiving order was pending in the Brentford County Court, an order was made in that court that the petitioning creditors' costs be taxed. The bill was duly brought in before the Registrar. The debtor took a general objection to all the items of the bill on the ground that the petitioning creditors' solicitor had not signed the roll of solicitors in the Brentford County Court, and that in those circumstances he was unable to practise in that court and was not entitled to claim any costs of so practising. The matter of this objection was brought before the county court judge on March 16, 1933, when his Honour ordered and adjudged that the debtor was entitled to succeed on the general objection to the whole of the bill of costs. The present appeal is an appeal by the petitioning creditors against this order.

By virtue of the Solicitors Act, 1843, ss. 2, 27, a solicitor of the Court of Chancery was entitled to be admitted as a solicitor in the Court of Bankruptcy on signing the roll of the Court of Bankruptcy. The constitution of the Court of Bankruptcy, as it existed in 1843, was modified by the Bankruptcy Act, 1849, and again by the Bankruptcy Act, 1861, the material matter for the purposes of this case being that provision was made by the last mentioned Act, ss. 3, 4, for transferring the powers of the Commissioners of Country District Courts of the Court of Bankruptcy to the judges of the county courts which had been set up under the County Courts Act, 1846.

Sect. 212 of the Bankruptcy Act, 1861, corresponding to and replacing s. 247 of the Act of 1849, enabled solicitors of the Court of Bankruptcy to practise in the Court of Bankruptcy and in any district court. By the Bankruptcy Act, 1869, s. 59, the London Bankruptcy Court as constituted under that Act became the Court of Bankruptcy for the London Bankruptcy District, and the county courts became local Bankruptcy Courts ; and, by s. 70 of the Act, the right to practise as a solicitor of and in the Court of Bankruptcy (an expression which seems plainly to include the local Bankruptcy Courts) was given to every attorney and solicitor of the superior courts; and the necessity for a practitioner being separately admitted a solicitor of the Court of Bankruptcy (and for that purpose signing the roll) before he could practise in the Court of Bankruptcy thus disappeared. In 1873, the Judicature Act, 1873, s. 3, provided for the consolidation of the London Court of Bankruptcy with various other courts, so as to constitute the Supreme Court of Judicature; but this provision did not become effective, as the Judicature Act of 1875, s. 9, enacted that the London Court of Bankruptcy should not be consolidated with the other courts, but should remain a separate court. It seems to follow that s. 87 of the Judicature Act, 1873, which dealt with the position of solicitors in the Supreme Court of Judicature, had, so far, no operation in regard to the position of solicitors in the Court of Bankruptcy, even in the London Court of Bankruptcy, and it contains nothing which deals with the county courts as local Bankruptcy Courts.

By the Bankruptcy Act, 1883, s. 93, the London Court of Bankruptcy was consolidated with the Supreme Court of Judicature and its jurisdiction transferred to the High Court of Justice; and, having regard to the terms of that section, which we need not set out at length, there can be no doubt that the position of solicitors as regards practice in bankruptcy matters in the Supreme Court of Judicature thereupon became governed generally by s. 87 of the Judicature Act, 1873 (now represented by s. 215, sub-s. 1, of the Supreme Court of Judicature Act, 1925), and by s. 151 of the Act of 1883, the special right of audience in court which they had had in the London Court of Bankruptcy was preserved to them in bankruptcy matters in the High Court. We can find nothing in the Act of 1883 which appears to affect the position of solicitors in regard to practising before county courts in their bankruptcy jurisdiction. The Bankruptcy Act, 1914, though it repeals the bulk of the 1883 Act, re-enacts the relevant provisions as to the jurisdiction in bankruptcy of the High Court and the county courts and replaces s. 151 of the old Act as to solicitors' special right of audience in the High Court by a new section (s. 152), and thus seems to leave the position unchanged.

The result of this survey of the statutes would so far seem to lead to the conclusion that a properly admitted solicitor of the Supreme Court has a statutory right to practise in the county court in its bankruptcy jurisdiction without any further qualification.

It appears, however, from the order made by the county court judge that the claim for disallowance of the items in dispute was based not only on ss. 2, 27 of the Solicitors Act, 1843, with which we have already dealt, but also on s. 26 of the Solicitors Act, 1860, and ss. 43, 44 of the Solicitors Act, 1932. Our attention was also drawn by counsel to Order LIV., r. 7, of the County Court Rules.

Sect. 26 of the Solicitors Act, 1860, imposes sundry penalties (including that of incapacity to recover fees) on any person who acts as a solicitor in contravention of s. 2 of the Act of 1843, that is to say, who practises as a solicitor without due admission and enrolment under the Act. It contains no reference to s. 27 of the Act of 1843, and it is at least arguable that, even during the period when a solicitor was precluded from practising in a Court of Bankruptcy without being admitted a solicitor of that court, upon signing its roll, the penalties imposed by s. 26 of the Act of 1860 could not have been invoked against the admitted solicitor who in fact practised in a Court of Bankruptcy without being specifically admitted as a solicitor in the Court of Bankruptcy and signing the roll of that court. If, however, we are right in the view that by the operation of the Bankruptcy Act, 1869, the necessity for a separate admission as a solicitor of the Court of Bankruptcy came to an end, s. 26 of the Act of 1860 seems to have no bearing on the matter with which we are concerned.

Order LIV., r. 7, of the County Court Rules provides that no solicitor shall be allowed to appear for any person in a court, until he has signed a roll or book to be kept for that purpose by the Registrar. The rule in question was made under s. 164 of the County Courts Act, 1888. In our judgment the rule (whatever its effect or operation may be) does not apply to the

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county court as a Court of Bankruptcy exercising jurisdiction in bankruptcy under the Bankruptcy Acts. In regard to the latter jurisdiction the rule making authority is that prescribed by s. 132, sub-s. 1, of the Bankruptcy Act, 1914, that is, the Lord Chancellor acting with the concurrence of the Board of Trade. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, sub-s. 6, appears to preclude the Supreme Court rule making authority constituted under that Act from making rules as to matters within the ambit of the power of making bankruptcy rules conferred by the Bankruptcy Act. It would be odd indeed if the county court rule making authority had power under the County Courts Act, 1888, to make rules in regard to the bankruptcy jurisdiction of the county courts as to matters within the ambit of the powers of the rule making authority constituted under the Bankruptcy Acts. It is to be observed that s. 164 of the County Courts Act, 1888, which sets up the county court rule making authority, provides that the power of making rules and orders shall extend to all matters of procedure or practice in any case within the cognizance of county courts, as to which rules of the Supreme Court have been made or might lawfully be made for cases within the cognizance of the High Court. When it is borne in mind that the authority charged with making the rules of the Supreme Court cannot, as pointed out above, make rules governing the High Court in its bankruptcy jurisdiction, the conclusion that Order LIV., r. 7, cannot apply to the county court exercising its bankruptcy jurisdiction appears to be inevitable. We may add that any other conclusion would be at least anomalous in view of the peculiar position which, as Lord Halsbury points out in *Skinner* v. *Northallerton County Court Judge* (1), the county court occupies when exercising its bankruptcy jurisdiction as compared with its position when exercising its general jurisdiction.

It only remains to state that, after the commencement of the proceedings in bankruptcy in which the costs were incurred with which we have to deal, the Solicitors Act, 1932, became law, which by s. 44, sub-s. 1, declares that every qualified

(1) [1899] A. C. 439.

solicitor may practise as a solicitor in the Supreme Court and (upon signing the roll of solicitors of any inferior court of law or equity which keeps such a roll) in that court. Sub-s. 8 of the same section provides that nothing in the Act shall prejudice or affect any right of practising in any court which immediately before the commencement of the Act was enjoyed by persons qualified to act as solicitors. Even if it were open to us to hold, in view of the various bankruptcy statutes and of Lord Halsbury's observations in the case cited, that the county court exercising bankruptcy jurisdiction is an inferior court, it would be quite impossible for us to treat that section as imposing a restriction on the right of solicitors to practise in the county court in bankruptcy as that right existed before the Act was passed.

It results that, in our view, the solicitor with whose bill we are dealing was entitled to practise in the county court in its bankruptcy jurisdiction without signing the roll of the court. We therefore reverse the decision of the county court judge and declare that the debtor's general objection grounded on the fact that the solicitor did not sign the roll of the county court ought to be disallowed. The debtor must be ordered to pay the costs of the application to the judge which resulted in the order under appeal and also the costs of this appeal, and the costs which he is thus ordered to pay must be allowed as part of the petitioning creditors' costs in the pending application for a receiving order. The deposit in Court will be paid out to the appellants.

We think it only right to point out that the relevant sections in the older Bankruptcy Acts on which, in our view, the matter turns, do not appear to have been brought to the attention of the learned county court judge.

Appeal allowed.
H. C. H.

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The debtor appealed. The appeal was heard on October 27, 30, 1933.

Donald Geddes (*Cecil Bennett* with him) for the appellant.

S. R. Sidebottom for the respondents was not called upon.

LORD HANWORTH M.R. This appeal fails. In the course of the case it has been suggested that the point which we have to consider is one not of merits but of pure technicality. But the case has certainly had the merit of enabling Mr. Geddes to present and the Court to hear an admirable argument from him in which he has found his way through a large number of somewhat confusing sections of various Acts of Parliament by no means easy to piece together.

The point raised is an important one. A solicitor conducted some proceedings in bankruptcy in the Brentford County Court, a court which has jurisdiction in bankruptcy. By r. 7 of Order LIV. of the County Court Rules: "No solicitor shall be allowed to appear for any person in a Court until he has signed a roll or book to be kept for that purpose by the Registrar." When the bill of the solicitor in this case was in suit the objection was taken that the solicitor could not recover by reason of the fact that he had not signed the roll and had not complied therefore with r. 7 of Order LIV. The county court judge felt the difficulty and allowed the objection. An appeal from that decision went before the Divisional Court which sits in bankruptcy. The position of that Court is particular in the sense that when there is an appeal on a bankruptcy matter from a county court it goes to a Divisional Court, which must be so composed that at least one of the judges to whom bankruptcy business is assigned in the High Court shall be a member of it. Thus the Divisional Court was composed of Clauson J. and Luxmoore J., who are two of the three judges at the present time to whom the duty is assigned by the Lord Chancellor of taking bankruptcy business. I point that out because it emphasizes the fact that the Court from which this appeal is now being taken was sitting in bankruptcy just as the county court below was sitting in bankruptcy; and the case comes before the Court of Appeal sitting in bankruptcy. We have therefore to consider the matter from the point of view of Courts which have jurisdiction in bankruptcy.

It is to my mind unnecessary to go through the relevant statutes, as this has already been done fully by Clauson J. I will only add a word or two on a point in his judgment which I think may properly be amplified, and except for that I am prepared to accept his judgment as my own.

By s. 70 of the Bankruptcy Act, 1869, it is provided: "Every attorney and solicitor of the Superior Courts shall be, and may practise as a solicitor of, and in the Court of Bankruptcy, and in matters before the Chief Judge or registrars, in the London Court of Bankruptcy, in court or in chambers, may appear and be heard without being required to employ counsel." It is beyond question that the county courts were given jurisdiction in bankruptcy, and Mr. Geddes admits that section to be one which would carry the right of audience and of practice in the Bankruptcy Court if it were still in operation. But, as he points out, in the Act of 1883 that section was repealed. I think the Act of 1869 is repealed in toto subject to the preservation of the words which are now found in the Interpretation Act, 1889, and in sub-s. 2 of s. 169 of the Bankruptcy Act, 1883. So said Mr. Geddes, it is not possible to rely upon s. 70. But the Bankruptcy Act, 1883, contains s. 151, which provides: "Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court." It will be observed that that section refers, as indeed did s. 70 of the earlier Act, particularly to the High Court and generally to all Courts having jurisdiction in bankruptcy. It appears to me that s. 151 safeguards the position and preserves for the solicitor the same rights that he had under s. 70. It follows that in the case of a county court sitting in bankruptcy, it was not necessary for a solicitor to comply with r. 7 of Order LIV., which has application to the general business of the county court and not to the particular business in bankruptcy.

But Mr. Geddes said that s. 151 referred only to a right of audience and not to a right to practise. I think that argument involves some confusion of thought. The audience which is given to solicitors is in respect of their own clients. They are not entitled to appear for persons who are not their own clients. They are not barristers. The distinction, I think, is well explained in *Ex parte Broadhouse.* (1) The question which arose there before the Court of Appeal was whether or not a Commissioner in Bankruptcy at the time when the Bankruptcy Act, 1861, was in operation was bound or not bound to hear a person who, although a duly admitted solicitor of the Court, did not appear as the solicitor of the party for whom he purported to appear. Sect. 212 of the Act of 1861 provides: "Every solicitor of the High Court of Chancery, now or hereafter admitted as a solicitor of the Court of Bankruptcy, may practise as such solicitor in the said Court, or in any District Court, and as to all matters before the Commissioners, or in chambers, may appear and plead without being required to employ counsel." Lord Cairns, speaking in reference to that, said (2): "That section, in my opinion, did nothing more than this, it absolved the solicitor from the necessity of appearing by counsel, and authorised him to appear in his own person, but did not, in any way, alter the ordinary character in which alone a solicitor is entitled to appear in any Court, viz., as the solicitor of a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is, that the Court should have before it a person who, on the one hand, is under an obligation to the Court because he is one of its officers, and, on the other hand, is under an obligation to the suitor because he is in privity with him, and is the actual person who represents him." Those words neatly present the position of the solicitor and his right of audience. It is not a general right to appear and to be heard on behalf of any person whom the solicitor may choose to represent. It is a right limited to appearing for persons for whom he is acting in his character of a solicitor. When that

(1) (1867) L. R. 2 Ch. 655.

(2) Ibid. 658.

definition of a solicitor's position is applied to s. 151 of the Act of 1883 it becomes apparent that when it refers to solicitors "who had the right of audience" the phrase "right of audience" is used as a term of art and in the qualified sense referred to.

Sect. 151 reappears in the Bankruptcy Act, 1914, as s. 152: "Nothing in this Act shall take away or affect any right of audience that any person may have had at the commencement of this Act." Indeed I think Mr. Geddes in his argument admitted that if s. 151 of the Act of 1883 was a section which by its terms gave to the solicitor the right to practise in bankruptcy and not merely the right of audience, the point that he had taken must fail.

For these reasons, elucidating that particular point of Clauson J.'s judgment, I think the appeal fails.

I will only add that I think it would be a serious matter if s. 2 of the Solicitors Act, 1843, did not, as in my view it does, refer to the Roll of Solicitors now in the charge of the Law Society, with regard to which, as Master of the Rolls, I have a particular duty, and which enables solicitors to prove that they are solicitors by their names being found upon that Roll.

I wish also to add that The Law List is made by statute receivable in all Courts as proof of the fact that a solicitor is upon that Roll; and I must not be taken to allow that any possible doubt could arise as to the meaning and purpose of s. 2 or as to what is the Roll therein contemplated. That point, however, is one which does not arise in the present case, because if we are satisfied upon what I would call the point as to the bankruptcy jurisdiction of the county court, it is not necessary to go into the wider question which Mr. Geddes suggested might possibly be arguable.

Slesser L.J. I am of the same opinion. This appeal raises important questions alike to solicitors and the public, and has been very clearly argued. But when the matter is properly considered I think the argument of Mr. Geddes rests on a false foundation. Under the Solicitors Act, 1843, the question had to be considered what was the position of solicitors in the superior Courts of law at Westminster and in the inferior courts. As my Lord pointed out, s. 2 deals with the admission of solicitors to the Roll. Sect. 27 deals with rights of practising in different Courts and provides that when persons seek to practise in inferior courts they must sign the roll of that court. Under the bankruptcy jurisdiction there is not that division between the superior and the inferior courts which we find recognized in the Solicitors Act and which, of course, always has existed in general. By the Bankruptcy Act, 1861, the Court of Bankruptcy is one Court, as is there explained, and this fact has had an effect on the whole bankruptcy jurisdiction which is exercised both in London and in the country. It was provided in the Act of 1861 that there should be a Court of Bankruptcy which was to exercise all the jurisdiction, if any, possessed "by the Court for the relief of insolvent debtors in England." Those words appear in s. 1. Then s. 2 says: "The present Commissioners of the Court of Bankruptcy shall continue to be Commissioners of the Court" in London. Then s. 3 says: "The judge of every County Court . . . . shall have and exercise within his respective district the like jurisdiction, powers and authorities . . . . as are vested in the Commissioners of the District Courts of Bankruptcy." So that the distinction between superior and inferior courts with regard to the practising of solicitors, contemplated by there being a separate roll of practice under s. 27 of the Solicitors Act, 1843, though not a separate roll of admission as solicitors, does not exist in the same way in the undivided Court of Bankruptcy. That is made quite clear by the section dealing with the right of solicitors to appear in the Court of Bankruptcy (s. 212 of the Act of 1861), which provides: "Every solicitor of the High Court of Chancery, now or hereafter admitted as a solicitor of the Court of Bankruptcy, may practise as such solicitor in the said Court or in any District Court, and as to all matters before the Commissioners or in chambers may appear and plead without being required to employ counsel." So that it is quite clear after 1861 that a solicitor could appear before the Court of Bankruptcy either in London or in the District Courts without any obligation to sign any roll, as provided by the Solicitors Act.

The whole question to be considered is, has that position been altered since 1861? In my opinion, when the relevant legislation is properly considered, it has not been altered, and solicitors now possess the same right to appear, without signing the roll of the county court, as they possessed in 1861. I should add that the Act of 1869 preserves the right of a solicitor to appear and be heard without employing counsel which existed in the Act of 1861.

The reason I come to that conclusion is that s. 151 of the Act of 1883 in terms provides: "Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act." That is absolutely general. Then it goes on to speak specifically of the High Court of Justice "and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in Bankruptcy matters in the High Court." As a matter of fact it has been held in *Ex parte Reynolds* (1) that that right extends to a right of audience on an appeal to the Divisional Court from a county court sitting in bankruptcy. I will cite one other authority which was mentioned by Clauson J., *Skinner* v. *Northallerton County Court Judge* (2), where Lord Halsbury points out that the county court judge sitting in bankruptcy has for the purposes of bankruptcy jurisdiction the High Court jurisdiction. He says (3): "The statute itself has made the county court the High Court for this purpose"—that is for the purposes of exercising bankruptcy jurisdiction. Therefore Mr. Geddes, in spite of his careful and ingenious argument, is unable to show to my satisfaction that the solicitor has lost any of the rights which were conferred upon him of audience before the Court in 1861. That really concludes this case, because I understand Mr. Geddes to concede, as indeed he must, that the rules of practice of the county court are not

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(1) 15 Q. B. D. 169.

(2) [1899] A. C. 439.

(3) Ibid. 441.

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applicable in the case of bankruptcy. They are framed under a different statute and by a different authority, and therefore in my view he cannot rely upon them. The Bankruptcy Rules are made by the Lord Chancellor with the concurrence of the President of the Board of Trade and the County Court Rules are made by five judges and three other persons, who frame rules and orders indicating the practice of the county court. Therefore, it is impossible to argue, and Mr. Geddes has very wisely not argued, that Order LIV., r. 7, is a Bankruptcy Rule. That, in my view, concludes the matter, but I should like to express my own indebtedness to Mr. Geddes for his argument on a very difficult and important subject.

ROMER L.J. I quite agree. With all respect to the learned county court judge who took the opposite view and with all deference to the excellent argument of Mr. Geddes, I confess the matter seems to me to be reasonably plain. Sect. 27 of the Solicitors Act, 1843, in effect provided that no solicitor should practise in a county court unless and until he had signed the roll of that court. Having regard to the limited nature of a solicitor's right of audience in a county court it necessarily follows that his right of audience was subject to the same condition. As he could not practise without signing the roll it would necessarily follow that he could not be heard until he had signed the roll. That section, prima facie, applies to the county court whatever jurisdiction it may be exercising, but as is pointed out by Clauson J., who delivered the judgment of the Divisional Court, s. 70 of the Bankruptcy Act, 1869, gives an unconditional right of practising to a solicitor when the county court is exercising its bankruptcy jurisdiction. That being so, it necessarily follows that his right of audience in bankruptcy matters in a county court was unconditional. But s. 70 of the Act of 1869 was repealed by the Bankruptcy Act, 1883, because it repealed the whole Act. Unless then we find in the Bankruptcy Act, 1883, some saving clause, it would necessarily follow that the solicitor's right of practice, and therefore of audience in the county court, when exercising its bankruptcy jurisdiction, would at once become conditional upon his signing the roll. But s. 151 of the Act of 1883, as was pointed out by the Master of the Rolls, provides: "Nothing in this Act . . . . shall take away or affect any right of audience that any person may have had at the commencement of this Act." It is no doubt strange that the right of practising is not in terms referred to but only the right of audience. Yet it does seem to me necessarily to follow that if the solicitor's right of audience in the county court is to remain unaffected, necessarily his right of practising must also remain unaffected. His right of audience depends upon his right of practising because it is a limited right of audience, limited in the sense pointed out by the Master of the Rolls.

That being so, it seems to me to follow that having regard to s. 151 of the Bankruptcy Act, 1883, Clauson J. was quite right when he said: "We can find nothing in the Act of 1883 which appears to affect the position of solicitors in regard to practising before county courts in their bankruptcy jurisdiction." That is sufficient to dispose of this case, and, in my opinion, for these reasons, this appeal fails.

Appeal dismissed.

Solicitors for appellant: *Hiscocks & Co.*

Solicitors for respondents: *Trollope, Winckworth, Crump & Sprott.*

H. C. G.

Explained. JONES *v.* HERXHEIMER [1950] 2 K. B. 106

Followed. SMILEY *v.* TOWNSHEND [1950] 2 K. B. 311

Distinguished. JONES *v.* HERXHEIMER. [1950] 1 All E.R. 323.

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[1932. H. 3087.]

Landlord and Tenant—Covenant to repair—Action for Possession and Damages—Measure of Damages—Forfeiture of lease—Acceleration of reversion—Right of tenant to set off Damages against increased value of reversion—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18.

A lessee having neglected to carry out the covenants in the lease as to painting and repairing the demised premises, was sued by the landlords for possession and damages for the breaches of covenant. No defence having been put in it was adjudged that the landlords had judgment for possession, and mesne profits and damages, to be assessed and certified by a Master. The Master assessed the damages at the amount by which the reversion in possession at the date of the forfeiture of the lease (namely, the date of the issue of the writ) was diminished by non-repair. The tenant, having claimed that he was entitled to set off the amount found by the Master to be the difference between the value of the reversion in possession at the date of the forfeiture and the value of the reversion expectant on the expiration of the term if the lease had not been forfeited, the Master refused the claim and decided that the tenant was not entitled to any set-off by reason of the acceleration of the reversion consequent upon the forfeiture. The tenant, relying on s. 18 of the Landlord and Tenant Act, 1927, appealed to the judge:—

Held, by Luxmoore J. and the Court of Appeal, that there could be no set-off, and that in assessing damages under the section in the circumstances of the case the Court had to ascertain the actual value of the property in its unrepaired state at the date of re-entry and the value which the property would then have had if there had been no breach of covenant, and the amount of damage sustained by the landlords was the difference between the value of the property as it stood and the value it would have had if the tenant had carried out his obligations under the covenants in the lease.

PROCEDURE SUMMONS.

These proceedings, which involved the construction of the Landlord and Tenant Act, 1927, s. 18, arose by reason of the claim in an action by landlords against a tenant for possession of certain premises comprised in a lease and damages for breaches of the covenant to repair therein contained.

The action was brought by the plaintiffs (who by virtue of certain acts and events were entitled to the legal estate in fee simple in reversion immediately expectant on the term) for the possession of certain premises comprised in a lease dated April 30, 1852, for a term of years expiring in 1938, on the ground that the defendant (who was the present assignee of the term granted by the lease and therefore the tenant) had committed various breaches of the covenant in the lease to paint and repair the demised premises. The lease contained the usual power of re-entry by the landlords for rent unpaid as therein mentioned or for any breach neglect non-performance or non-observance of any of the tenant's covenants.

No defence was delivered in the action and judgment was given for possession and mesne profits and damages to be ascertained by a Master. At the hearing before the Master he found that the correct measure of damages was the amount by which the reversion which fell into possession at the date of the forfeiture of the lease (i.e., the date of the issue of the writ in the action) was diminished owing to the defendant's breaches of covenant, and, on this footing, assessed the damages at 500*l.* The defendant contended that he was entitled to set off against such sum the amount of the difference between the value of the reversion as having fallen into possession at the date of the forfeiture of the lease and the value of the reversion on the footing of it only falling into possession on the expiration of the term in 1938, which amount was found by the Master to be 475*l.* This contention was rejected by the Master, who found that the tenant was not entitled to any set-off by reason of the acceleration of the reversion by forfeiture.

The tenant then brought the matter by way of appeal from the Master before Luxmoore J.

A. Grant K.C. and *G. J. Paull* for the applicant. The point raised is an important one and involves the construction of s. 18 of the Landlord and Tenant Act, 1927. (1) Before

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(1) Landlord and Tenant Act, 1927, s. 18, sub-s. 1: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid. . . ."

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this Act two measures of damages prevailed, one where the landlord during the lease brought an action for damages for breach of a covenant and the other where the action was for a breach of a covenant to deliver up in proper repair. The tenant could be made liable for these damages whatever the landlord liked to do with the site. The Act of 1927, it is submitted, changed this.

Strictly there is no reversion after the termination of a lease, therefore there can be no value in a reversion ; *Maples* v. *Pepper* (1), and see *Inderwick* v. *Leech.* (2) No damages are therefore recoverable. In law there can be no such thing as an " immediate reversion." The section was considered by Maugham J. in *Terroni and Necchi* v. *Corsini* (3) where the meaning of " reversion " was discussed. See also *T. M. Fairclough & Sons, Ld.* v. *Berliner* (4), on the point raised by s. 18 : As to the meaning of the word " reversion " see Stroud's Judicial Dictionary, 2nd ed., p. 1753, and the phrase " immediate reversion " at p. 910.

W. T. Elverston for the plaintiffs, respondents to the summons. It is submitted that the word " reversion " in the section has the same meaning as is given to it in Stroud's Judicial Dictionary—namely, the returning of the land after the particular estate ended.

A. Grant K.C. in reply.

LUXMOORE J. The question which has to be determined on this summons is what is the measure of damage for breach of covenant to repair in a case where the lease has been forfeited by re-entry ? Is the fact that the forfeiture has accelerated the termination of the leasehold term to be taken into account or not ?

Under the law before the Landlord and Tenant Act, 1927, was passed, a landlord could recover by way of damage at the termination of his term the actual cost of executing the repairs required to fulfil the covenant. The Landlord and Tenant Act, 1927, has not changed the law in that respect ;

(1) (1856) 18 C. B. 177.
(2) (1884) Cab. & El. 412.
(3) [1931] 1 Ch. 515.
(4) [1931] 1 Ch. 60.

all that it has done is to impose a limit on the amount of those damages. The material section to be considered is s. 18 of the Landlord and Tenant Act, 1927. Sub-s. 1 is in these terms: " Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

The first question to be determined is what is meant by the phrase " reversion (whether immediate or not)." It cannot mean the actual outstanding term, because at the termination of the lease there is no outstanding term at all; and in that case there would be nothing of any value from which any deduction could be made. " Reversion " is a word which in its ordinary sense connotes that something is to come back at the end of the currency of an existing term. The word is one which has two meanings. This was recognized by Staunford J. in *Throckmerton* v. *Tracy* (1): the material passage in his judgment is to be found at p. 160 of the report. It is as follows: " A reversion has two intendments, the one is an estate left continuing during the particular estate, which is the most common sense, the other is the returning of the land after the particular estate ended, which is the natural sense of the word, according to the definition of the Latin-tongue, so that the reversion of the land, and the land when it reverts, is all one. And the statute of Westminster 2, cap. 1, which says, that they to whom the land was given under such condition, shall have no power to alien the same, but that it shall revert unto the giver, if issue fail, etc., intending to put a stop to the power of the donee from barring the donor of the reversion of the land, prohibits his alienation, and directs that the land shall revert to the donor, so that the reversion of the land, and the land reverting, is all one." I think in the section I am considering the word "reversion" is used in the latter of the two senses, namely as referring, in the case where the lease has terminated, to the land which has reverted. If this is the correct view, there seems to be very little difficulty in applying the section to the present case. What the section provides for is that the damages for breach of covenant on the termination of a lease are not to exceed the amount by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement; that is, you take the value of the reversion as it is with the breach—the value of the property which has reverted as it is subject to the breach—and you take it as it would be if there were no breach, and you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired. If that is the right way of looking at it (as I think it is), then the learned Master was quite right in saying that there is nothing in the section to suggest that you must bring into consideration any appreciation in the value of the reversion by reason of the fact that the landlord has forfeited the lease and so accelerated the termination of the leasehold term. As I understand the learned Master's decision he has found that the difference between the value of the property unrepaired and if put in a proper state of repair would be 500*l.*, and he has found that as the measure of damage. He has gone on to find that the value to the landlord by reason of the acceleration of the termination of the lease is 475*l.*; but there is no warrant in the section for deducting that or taking that into account in the matter at all. That is a matter which would be properly taken into account if the tenant had exercised his other right, a right to be relieved from the forfeiture.

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(1) (1555) Plowd. 145, 160.

In my judgment, the Master's decision is correct, and his certificate should find that the damage for the breach of covenant to repair is 500*l.*, and I direct the Master to so find in his certificate.

A. R. T.

C. A.

The tenant, with the leave of the Court, appealed. The appeal was heard on December 18, 1933.

A. Grant K.C. and *G. J. Paull* for the appellant. The Landlord and Tenant Act, 1927, was passed with the object of relieving tenants, in the case of the breach by them of covenants in their leases, and to prevent landlords from acquiring an undue profit at the expense of their tenants. Here the landlords by going into possession on forfeiture have accelerated their reversion and have obtained an advantage estimated by the Master at 475*l.* On the other hand, by reason of the non-performance by the tenant of the covenants to repair they have sustained a loss of 500*l.*, that sum being necessary to put the property into repair. The landlords must therefore allow the tenant to set-off the 475*l.* against the 500*l.* [They referred to *Joyner* v. *Weeks.* (1)]

Vaisey K.C. and *W. T. Elverston* for the respondents were not called upon to argue.

LAWRENCE L.J. In my judgment this appeal fails. The action is brought by landlords for the possession of certain premises comprised in a lease dated April 30, 1852, for a term of years expiring in 1938, on the ground that the tenant had committed breaches of the covenants to paint and repair. The landlords also claim damages for the breaches of covenant. No defence was delivered and judgment was given for possession and mesne profits and damages to be ascertained by a Master. When the matter came before the Master it was contended on behalf of the tenant that he was entitled to set-off against the damages for his breaches of covenant the difference between the value of the premises in possession at the date of re-entry and the value which the reversion would then have had if the lease had not been determined. The Master—and I think rightly—rejected that contention, and came to the conclusion that the correct measure of damages was the amount by which the value of the premises was diminished at the date of re-entry by reason of the non-performance of the covenants to paint and repair, and that the tenant was not entitled to any set-off on account of what he termed " the acceleration of the reversion." In my opinion the expression " acceleration of the reversion " is inept. For the purposes of the present case the reversion consists of the freehold subject to the lease. One of the provisions of the lease is that the landlords may determine the term on a breach of covenant by the tenant. The term granted by the lease is therefore subject to determination in that event under the express provisions of the lease. In these circumstances it cannot properly be said that the reversion has been accelerated when the landlords re-enter for breach of covenant.

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(1) [1891] 2 Q. B. 31.

The tenant appealed against the decision of the Master to Luxmoore J., and relied upon s. 18 of the Landlord and Tenant Act, 1927, the relevant portion of which is the first part of sub-s. 1—namely : " Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

The expression " whether immediate or not " in the above passage, is I think explained by reference to the case of *Joyner* v. *Weeks* (1), to which our attention has been called by Mr. Grant. A reversion may not be a reversion in possession (i.e., it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is to be disregarded in assessing the damages. In my judgment what the Court has to do in assessing damages under the section in the circumstances of this case is to ascertain the actual value of the property at the date of re-entry and the value which the property would then have had if there had been no breach of covenant; and the difference between these two values is the amount of the damages sustained by the landlord (that is to say) the difference between the value of the property as it stands and the value which it would have had in case the tenant had fulfilled his obligations under the covenants in the lease. I cannot express it better than the learned judge has expressed it in his judgment in the present case, when he says: "What the section provides is that the damages for breach of covenant on the termination of a lease are not to exceed the amount by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement; that is, you take the value of the reversion as it is with the breach—the value of the property which has reverted as it is subject to the breach—and you take it as it would be if there were no breach, and you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired."

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(1) [1891] 2 Q. B. 31.

Mr. Paull has addressed an ingenious argument to the Court. He contended that the right procedure to adopt in assessing damages under the section is to ascertain the value of the reversion before the breach (that is to say, when the lease has a certain number of years still to run), and then ascertain the actual value of the property after the breach has been committed, and the landlord has re-entered under the proviso for re-entry; and then set-off the value of the reversion before the breach was committed, against the actual value of the property upon which the lessor has re-entered. How that method could be applied to the case of a continuing breach such as the present Mr. Paull did not explain, but be that as it may I think that this contention is ill-founded. It is plain that the reversion referred to in the section means the freehold or leasehold estate of the landlord subject to the lease or sub-lease, and that it would not be right to adopt any such procedure as Mr. Paull has contended for.

For these reasons I am of opinion that this appeal ought to be dismissed with costs.

Romer L.J. I am entirely of the same opinion. Whatever may be the strict meaning at law of the word "reversion" there can, I think, be no doubt as to the meaning that that word bears in the section of the Landlord and Tenant Act, 1927, with which we are concerned here. The reversion in that section, if it be a freehold reversion, means the freehold subject to the lease, and valuing the reversion for the purposes of the section you must value the freehold subject to so much, if any, of the term of the lease as remains in existence. That that is so is plain from the following consideration. Let me read the section so far as it applies to breach of covenant to leave the premises in repair at the end of the lease. It says: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

Now where a lessor seeks to recover damages from his tenant for breach of the covenant to leave the premises in repair, the section says that the reversion is to be valued. Of course, strictly speaking, there is no reversion left, because the lease is determined, and that indicates plainly, to my mind, that for the purpose of the section the freehold has always to be valued subject to so much, if any, of the term as remains unexpired. Let me apply this consideration to the present case. Here there was a continuing breach of a covenant to repair. The landlords, after taking the proper steps to end the tenancy, issued their writ on August 9, 1932, for the purpose of recovering possession and damages for breach of the covenant to repair. By issuing that writ they elected finally to determine the tenancy, as they had power to do under the proviso for re-entry contained in the lease. That was a proviso, of course, for which the landlords had stipulated at the time the lease was granted. The section says in those circumstances the value of the reversion has to be ascertained. The value of the freehold therefore has to be ascertained subject to so much, if any, of the term of the lease as remains unexpired, and, inasmuch as on August 9 they elected to determine and did determine the lease, no part of the term is unexpired. The value of the unencumbered freehold has to be ascertained. The fact that the lease did come to an end on August 9 sufficiently appears from the order that is made, because the judgment provided that the landlords should recover possession against the tenant and the mesne profits which the Master is directed to ascertain are to be calculated as from August 9. In my opinion the learned judge arrived at the correct view of the meaning of this section, and I agree with my Lord that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Dehn & Lauderdale.*
Solicitors for respondent: *Beamish, Hanson, Airy & Co.*

W. I. C.

MAUGHAM J.

1933

Oct. 17.

In re WALTER SYMONS, LIMITED.

[No. 00281 of 1933.]

Company—Voluntary Winding-up—Memorandum and Articles—Construction—Preference shareholders—" Fixed cumulative preferential dividends" —Dividend not declared—Surplus assets—Arrears of dividend—Repayment of capital—Ordinary shareholders—Priority.

A clause in a company's memorandum of association in force at the date of a resolution for voluntary winding-up provided that the company's preference shares should confer the right to a fixed cumulative preferential dividend and to half the surplus profits for each year after payment (or provision for the payment) of a specified dividend on the company's ordinary shares, and that the preference shares should rank with regard both to dividends and to capital in priority to the ordinary shares. The company's articles of association in force at the date of the resolution for winding-up provided (inter alia) that the company's profits which it should be determined to divide in any year should be applied, first, in paying a fixed cumulative preferential dividend to the preference shareholders, secondly, in paying a specified dividend to the ordinary shareholders, and thirdly, as to half in paying a further dividend to the preference shareholders, and as to half in paying a further dividend to the ordinary shareholders. The articles further provided (inter alia) that capital paid up on shares in advance of calls upon the footing that it should carry interest should not while carrying interest confer a right to participate in profits, that the company in general meeting might declare a dividend to be paid to the members according to their rights and interests in the profits, that no larger dividend should be declared than was recommended by the directors but that the company in general meeting might declare a smaller dividend, and that no dividend should be payable except out of the company's profits or should carry interest against the company.

Dividends were paid on the preference shares up to and including the year ending March 31, 1930, but not for the years ending March 31, 1931, and March 31, 1932, or for the period from April 1, 1932, to September 30, 1932, the date of the resolution for winding-up. Certain preference shareholders claimed to be paid, out of the assets available for distribution, sums representing dividends on their shares for the period since March 31, 1930, and/or otherwise to share in those assets in priority to any repayment of capital to the ordinary shareholders:—

Held, that, on the true construction of the memorandum and articles of association, the preference shareholders were entitled, in priority to the ordinary shareholders, to payment of arrears of fixed cumulative preferential dividend and to repayment of capital.

SUMMONS IN A WINDING-UP.

This summons was taken out by the liquidator of Walter Symons, Ld. (hereinafter called "the company"), for the determination of (inter alia) the rights of preference shareholders, upon the true construction of the company's memorandum and articles of association, with regard to dividend or arrears of dividend on their shares.

The company was incorporated in 1906 under the Companies Acts, 1862 to 1900. By a special resolution passed at an extraordinary general meeting of the company on September 30, 1932, it was resolved that the company be wound up and that the applicant on this summons be appointed liquidator. The company's nominal capital at the date of the resolution was 10,000*l.* divided into 12,000 preference shares of ten shillings each, all issued and fully paid, and 16,000 ordinary shares of five shillings each. Clause 5 of the company's memorandum of association in force at the date of the resolution provided that the preference shares "shall confer the right to a fixed cumulative preferential dividend at the rate of 12 per cent. per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits which in respect of each year shall remain after paying or providing for the payment of a dividend for such year at the rate of 10 per cent. per annum on the capital for the time being paid up on the ordinary shares, and shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets. . . . ." The company's articles of association in force at the date of the resolution provided (inter alia) as follows: Article 98. ". . . . the profits of the company, which it shall from time to time be determined to divide in respect of any year or other period shall be applied (first) in paying to the holders of the preference shares a fixed cumulative preferential dividend at the rate of 12 per cent. per annum, (secondly) in paying a dividend at the rate of 10 per cent. per annum on the capital paid up on the ordinary shares, and (thirdly) as to one half of such distributable surplus profits in paying a further dividend to the holders of the preference shares, and as to the other half of such distributable surplus profits in paying a further dividend to the holders of the ordinary shares." Article 99. "Where capital is paid up on

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Walter Symons, Ld., *In re.*

any shares in advance of calls upon the footing that the same shall carry interest, such capital shall not whilst carrying interest confer a right to participate in profits." Article 100. "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits." Article 101. "No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend." Article 102. "No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company."

Dividends at the full rate applicable in each year were paid on the company's preference shares up to and including the year ending March 31, 1930. For the year ending March 31, 1931, the year ending March 31, 1932, and the period from April 1, 1932, to the date of the liquidation no dividend was paid on those shares. The liquidator estimated that, after the company's debts had been paid and its assets collected, the capital paid upon the preference shares repaid to the preference shareholders, and provision made for the costs of the winding-up, the assets available for distribution among those entitled would amount to about 1750*l.* Certain preference shareholders claimed to be paid, out of those assets, sums representing dividends on their shares for the period since March 31, 1930, and/or otherwise to share in those assets in priority to any repayment of capital to the ordinary shareholders: and by this summons, which was issued on April 21, 1933, the liquidator asked (inter alia) (1.) whether, upon the true construction of the company's memorandum and articles of association and in the events which had happened, the holders of preference shares at the date of the liquidation were entitled to receive, in priority to the repayment of the capital paid up on the ordinary shares, any and if so what sums in respect of dividend or arrears of dividend on their preference shares, or whether, after repayment of the capital paid up on the preference shares, the whole of the company's assets should be distributed among the ordinary shareholders, or how otherwise they should be dealt with.

H. S. G. Buckmaster for the liquidator.

Wilfrid M. Hunt for the preference shareholders. Unless clause 5 of the memorandum can be construed to mean that in a winding-up the preference shares rank, with regard to arrears of dividend, in priority to the ordinary shares, the claim of the preference shareholders must fail. The clause can be construed to admit their claim: *In re W. J. Hall & Co., Ld.* (1); *In re New Chinese Antimony Co., Ld.* (2); *In re Springbok Agricultural Estates, Ld.* (3) In a clause of this kind "dividend" means "interest" payable, while the company is a going concern, out of assets, when it is in liquidation, out of profits, if there is no express contrary intention: *In re Roberts and Cooper, Ld.* (4); *In re William Metcalfe & Sons, Ld.* (5) In the clause in the present case "dividends" means "arrears of dividend": *In re Dominion Tar & Chemical Co.* (6)

D. Ll. Jenkins for the ordinary shareholders. There is no provision for the payment of arrears of preferential dividend in a winding-up, and there is no reference to arrears, in the memorandum and articles. As there was no resolution for payment of arrears while the company was a going concern, the preference shareholders are not entitled to payment of arrears or their equivalent in a winding-up: *In re Roberts and Cooper, Ld.* (4); *In re Crichton's Oil Co.* (7); Buckley on the Companies Acts, 11th ed., p. 449. "Surplus assets" are not capital, income, or profits. Therefore the preference shareholders are entitled to receive, in priority to the ordinary shareholders, only the amount paid up on the shares: they are not entitled to participate further in the surplus assets.

MAUGHAM J. The point that comes before me for decision is in my opinion by no means free from doubt. Perhaps I may observe that it is only after some experience that one appreciates the infinite number of combinations and permutations that company draftsmen are capable of using in what are called their "capital clauses" in the drafting of company memoranda and articles.

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(1) [1909] 1 Ch. 521.
(2) [1916] 2 Ch. 115.
(3) [1920] 1 Ch. 563.
(4) [1929] 2 Ch. 383.
(5) [1933] Ch. 142.
(6) [1929] 2 Ch. 383, 387.
(7) [1902] 2 Ch. 86.

In the present case the clause which falls for construction in the winding-up of the company is clause 5 of the memorandum. The company was formed in the year 1906 and it was wound up voluntarily in the year 1932. The clause in question confers on the preference shareholders "the right to a fixed cumulative preference dividend at the rate of 6 per cent."—which I understand has since been increased to 12 per cent.—"per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits which in respect of each year shall remain after paying or providing for the payment of a dividend for such year at the rate of 10 per cent. per annum on the capital for the time being paid up on the ordinary shares," and provides that their shares "shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets." Together with that clause in the memorandum one has to consider the effect of the various articles as to dividends, and particularly articles 98 to 101 inclusive. They are substantially in the ordinary form, having regard to clause 5 of the memorandum. They provide, amongst other things, that the company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits; that no larger dividend shall be declared than is recommended by the directors; but that the company in general meeting may declare a smaller dividend; that is article 101. Article 102 is: "No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company."

I think it is conceded, at any rate I think it is clear, that, but for the words "and shall rank both as regards dividends and capital in priority to the ordinary shares," the preference shareholders would not be entitled to claim in a winding-up payment of the arrears of fixed cumulative preferential dividend at the rate of 12 per cent. The question, therefore, is reduced to this: What is the true meaning of the words that I have last cited? To my mind, it is reasonably clear on construction that they refer to something which is to take place in the winding-up. Not only does that appear from the word "rank," but it also appears from the reference to capital, which of course would not be distributable if the company were a going concern; and, finally, the words "but shall not confer the right to any further participation in profits or assets" seem to me to point very strongly in favour of the view that it is a clause which in this case is dealing with what is to happen in the winding-up. So reading it, I have the earlier part of the clause, which confers a cumulative preferential dividend at a fixed rate on the capital paid up on the preference shares and a right to half the distributable surplus profits of each year after paying 10 per cent. per annum for a particular year on the capital paid up on the ordinary shares. Then I read the subsequent clause, in effect, as if it said: "And in the winding-up the preference shares shall rank, both as regards dividends and capital, in priority to the ordinary shares." It is perfectly clear that no dividend has been declared in the case of this company for the years subsequent to March 31, 1930. It turns out that there is, as a result of the liquidation, a sufficient amount to pay the preference shareholders their capital in full, and there remains some 1750*l.* available for distribution among the persons entitled. I must also take it from the evidence that, at the date of the liquidation, there was a sum which had been put to general reserve account which might have been applied for the purposes of declaration of dividend on the preference shares, though, as I have already pointed out, no such dividend was declared or could be declared if the directors declined to recommend such a declaration.

Now, how am I to construe the word "dividends" in the phrase "both as regards dividends and capital," regarding that, as I have said I do, as a phrase meaning "in the winding-up"? On the whole, though not without hesitation, I have come to the conclusion that the word "dividends" should be construed as meaning "arrears of fixed cumulative preferential dividend." This clause is dealing, at any rate in this place, with the rights of preference shareholders who are stated to be entitled as of right to a fixed cumulative preferential dividend. It is true that the directors had a power to withhold payment of that dividend, but without depriving the preference shareholders of their right at some future time to be paid. That is derived from the use of the word "cumulative" and I think the draftsman, when he penned this part of clause 5, was regarding a right to that dividend as existing notwithstanding the winding-up, and he is here stating that both as regards the arrears of fixed cumulative preferential dividend and as regards capital the preference shareholder is entitled to priority over the ordinary shares and I so decide.

The cases which have been properly referred to are, every one of them, cases which depend upon the particular language used, and I do not conceive that in coming to the conclusion at which I have arrived I am in any way departing from any principle which is laid down in any of those cases; nor do I think I should be performing a useful task if I stated the facts with regard to those cases, which, after all, can only be understood by very attentive consideration of the memoranda and articles which were concerned.

I shall therefore decide that upon the true construction the holders of the preference shares are entitled to receive in priority to the repayment of capital paid up on the ordinary shares the arrears of dividend on their preference shares at a fixed rate which I understand is 12 per cent.

Solicitors: *Hair & Co.*

K. R. A. H.

In re EDWARD BRANDRAM JONES (DECEASED).

PUBLIC TRUSTEE *v.* JONES.

BENNETT J.

1933

Dec. 14, 21.

[1933. J. No. 1701.]

Will—Will executed before 1926*—Entail of Personal Estate—Trusts corresponding to Trusts affecting Land—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 130, *sub-s.* 3.

A testator, whose will was executed before 1926, devised his residuary estate after the death of his wife upon trust to pay the income to the beneficiary in possession of the P. Estate under the will of his uncle. The wife died in 1933. The residuary estate was entirely personalty. By the will of the uncle the P. Estate was devised to the use of his soil R. C. J. for life with remainder to his sons successively in tail with remainder to his son H. T. J. for life with remainder to his sons in tail with remainder over to the testators's right heirs. R. C. J. had no issue and was in possession of the P. Estate as tenant for life. H. T. J. had one son, R. B. J., who was living and had an infant son.

The question arose whether the law in force before 1926 applied, under which R. B. J. as the first tenant in tail would take the personalty absolutely subject to the prior life interests, or whether under s. 130, sub-s. 3, of the Law of Property Act, 1925, an estate tail had been created in the personalty, so that the infant son of R. B. J. was entitled in tail until his father executed a disentailing assurance:—

Held, that the sub-section does not operate unless there is in the will to be construed a direction that the personalty shall be held upon trusts described in the exact words of the sub-section; that, such words not being used in this will, the sub-section did not apply; and that after the death of the wife the property was to be held under the law in force before 1926.

ADJOURNED SUMMONS.

Edward Brandram Jones by his will dated April 20. 1923, appointed his wife Constance Penelope Harriet Jones sole executrix thereof and Edward Marshall Headley and the Official [*sic*] Trustee trustees thereof and after giving a pecuniary legacy and certain specific legacies desired his trustees to allow his said wife to draw the income of his property for her life and after her death made certain further pecuniary and specific legacies and after the death of his said wife he devised all the remainder and residue of his property upon trust to pay the income or allow it to be received by the beneficiary in possession of the Poulstone Estate as set out in the will of his uncle Richard Jones in regard to the same to help a member of the family to hold the estate and reside thereon.

The testator died on February 1, 1925, and his will was duly proved in the Principal Probate Registry on April 14, 1925. The testator's wife Constance Penelope Harriet Jones died on January 26, 1933. All the debts and funeral and testamentary expenses of the testator and the duties payable upon his death and the legacies given by his will have been paid and his residuary estate is of the value of 20,000*l.* or thereabouts. Edwin Marshall Headley predeceased the testator, and the Public Trustee is now the sole trustee of his will. The testator's uncle Richard Jones by his will dated January 18, 1876, and duly proved on March 1, 1894, devised and appointed (inter alia) the Poulstone Estate, referred to in the testator's will, to the use of his eldest son Richard Charles Stuart Jones and his assigns during his life without impeachment of waste and after his death to the use of his first and every other son successively according to their seniority in tail with remainder to the use of all his daughters as tenants in common in tail with remainder to the use of his second son Henry Thomas Brandram Jones and his assigns during his life without impeachment of waste, with remainder to the use of his first and every other son successively according to seniority in tail with remainder to all his daughters as tenants in common in tail with remainder to the use of his third fourth fifth sixth and every other son successively according to their respective seniorities and their respective assigns during their respective lives with remainder to their respective issue in strict settlement with remainder to the testator's daughters in strict settlement with an ultimate remainder to the testator's right heirs for ever.

The eldest son of the said Richard Jones, Canon Richard Charles Stuart Jones, is of the age of sixty-seven years and has been only once married and has had no issue. He is now in possession of the Poulstone Estate as tenant for life. The second son of the said Richard Jones, Henry Thomas Brandram Jones, has had issue two sons only, Richard Basil Brandram Jones and Humphrey Francis Brandram Jones. Richard Basil

ERRATUM.

(1934) 1 Ch.

Page	Lines	
316	3 and 5	For 1925 read 1927.

Brandram Jones died on May 21, 1916, without leaving issue. Humphrey Francis Brandram Jones has had issue two children only, Richard Edmund Brandram Jones and Robert Alan Brandram Jones, who are infants.

Upon the death of the said Constance Penelope Harriet Jones questions arose as to the devolution of the testator's residuary estate, which was entirely personalty, under the terms of the will. Canon Richard Charles Stuart Jones claimed to be absolutely entitled to such residuary estate or to a life interest therein. The said Humphrey Francis Brandram Jones claimed that subject to any prior life interests therein the said residuary estate vested in him absolutely as the first tenant in tail to attain a vested interest under the devise of the Poulstone Estate by the said Richard Jones. The eldest son of Humphrey Francis Brandram Jones claimed that under section 130, sub-section (3), of the Law of Property Act, 1925, there was an estate tail created in the personalty and that he had an interest until his father executed a disentailing assurance.

The Public Trustee issued this summons, to which Canon Richard Charles Stuart Jones, Henry Thomas Brandram Jones, Humphrey Francis Brandram Jones, Richard Edmund Brandram Jones, an infant, and Elizabeth Ridley (one of the next of kin of the testator) were defendants. The questions asked were: (1.) Whether on the true construction of the will of the testator his residuary estate from the death of his widow on January 28, 1933, is held on trust, (*a*) for the first defendant during his life with remainder in trust for his eldest or only son (if any) or in default of any such son for his daughter or daughters (if any) and if more than one as tenants in common absolutely or in default of any such son or daughter for the second defendant during his life with remainder in trust for the third defendant absolutely, or (*b*) as if the same were capital moneys settled on trust to purchase real estate to follow the limitations of the said Poulstone Estate under the will of the said Richard Jones with effectual entailed interests, or (*c*) for the first defendant absolutely. (2.) Generally, that it may be determined upon what trusts the said residuary estate and the income thereof since January 26, 1933, is held, and who are entitled thereto and for what interests and in what shares and proportions, and whether the same is or in some and what events will be undisposed of and devolves as on the intestacy of the testator, and how the Public Trustee ought to apply and deal with such residuary estate and the income thereof, and if there is or may be any intestacy that it may be determined out of what part of the estate the testator's debts and funeral and testamentary expenses and legacies ought to be treated as paid.

By the Law of Property Act, 1925, s. 130, sub-s. 3 : " Where personal estate (including the proceeds of sale of land directed to be sold and chattels directed to be held as heirlooms) is, after the commencement of this Act, directed to be enjoyed, or held with, or upon trusts corresponding to trusts affecting, land in which, either before or after the commencement of this Act an entailed interest has been created, and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate."

Wilfrid Hunt for the Public Trustee.

Evershed K.C. and *Stuart Bathurst* for the first three defendants. Under the law as it stood before the Law of Property Act, 1925, the residuary estate of the testator being personalty would have vested absolutely in the third defendant Humphrey Jones as the first tenant in tail in remainder subject to the prior life interests of the first and second defendants. This would have been the result of the devise in the will of Richard Jones according to which the residuary estate was to be held. The question is whether s. 130, sub-s. 2, of the Law of Property Act, 1925, has altered this result. The infant defendant claims that under this sub-section the entail continues in the personalty and that his father the third defendant takes no absolute interest, unless he executes a disentailing assurance. We submit that this is not the position but that the sub-section only applies in a case where the actual words of the sub-section are used in the will, and in case of a will taking effect before 1926 the personalty must be directed either to be enjoyed with real estate or upon trusts corresponding to those of real estate. No such words are used in this case. The sub-section has been considered in two cases: by Clauson J. in *In re Price* (1) and by Maugham J. in *In re Hind* (2), and in each case the learned judge said that the sub-section must be construed strictly according to the words used. Here the devise does not correspond with the words of the sub-section, and the old law applies so that the first two defendants take life interests in the residuary estate, and subject to those interests the third defendant takes an absolute interest.

J. V. Nesbitt for the infant defendant. I admit that apart from s. 130, sub-s. 3, the third defendant would have taken absolutely: see *In re Fothergill's Estate* (3); but that sub-section changed the old law. There has been no actual decision on the meaning of the sub-section, but I submit that it should not be construed in too narrow a sense nor that the actual words of the sub-section must be used in a will to bring the sub-section into effect. Here the will provides that the residuary estate, which is personalty, should be held upon trust to pay the income to the persons entitled to the income of the real estate. This is a trust affecting land upon which an entailed interest has been created, and it really comes within the sub-section as corresponding to the trusts of real estate. It is impossible to suppose that the testator could have prophesied the passing of the sub-section and have used the exact words therein contained. Neither *In re Price* (1) nor *In re Hind* (2) can be held to apply to this case. I submit that the sub-section applies, and that the personalty like the realty is to be held by the first and second defendants for life and subject thereto by the third defendant in tail.

G. D. Johnston for the next of kin contended that there had been an intestacy as to the residuary estate.

BENNETT J. This question arises upon the will of Mr. Edmund Brandram Jones, who gave his wife a life interest in all his property, and after her death said "I leave all the

(1) [1928] Ch. 579, 590.
(2) [1933] Ch. 208.
(3) [1903] 1 Ch. 149.

remainder and residue of my property." [His Lordship read the terms of the will down to "reside thereon."]

Under the testator's uncle's will the first defendant, Richard Charles Stuart Jones, is the tenant for life in possession of the Poulstone Estate, with remainder to his son, who has died, in tail, with remainder to the second defendant, Henry Thomas Brandram Jones, for life, with remainder to the third defendant, Humphrey Francis Brandram Jones, in tail. The fourth defendant, Richard Edmund Jones, is the eldest son of the third defendant and an infant. The third defendant has not executed any disentailing assurance.

The question is what are the respective interests (if any) of these four defendants in the testator's property, which is personal estate.

First, as a matter of construction, in my judgment, the meaning of the residuary gift is that the trustees are to pay the income to the person or persons for the time being entitled in possession to the Poulstone Estate, as set out in the will of the testator's uncle, Richard Jones, and it is clear, I think, upon that construction that until the Law of Property Act, 1925, came into operation the whole of the residue of the testator's estate, it being personal property, would have vested absolutely in the third defendant, the tenant in tail in remainder, subject to the prior life estates of the first and second defendants respectively. This seems to me to be well established: see *In re Fothergill's Estate.* (1)

Now that conclusion disposes of the interests of Mr. Johnston's clients, the next of kin, but it leaves for consideration the interests of Mr. Nesbitt's client, the fourth defendant, and he has argued that s. 130, sub-s. 3, of the Law of Property Act, 1925, interferes with the operation of this well established rule, stated in the case to which I have referred, and operates so as to create an estate tail in the personal estate, in which his client has an interest until by disentailing assurance the third defendant, who is his father, bars the entail. The question turns entirely upon the language of sub-s. 3 of s. 130 of the Law of Property Act, 1925. The language of that sub-section

(1) [1903] 1 Ch. 149, 156.

is as follows, I omit the words in brackets. [His Lordship read the sub-section with that omission.] The question is an extremely narrow one, and is whether by the will of the testator it is possible to say that the personal estate is directed to be held upon trusts corresponding to trusts affecting land. The decision and observations of Clauson J. in *In re Price* (1) and of Maugham J. in *In re Hind* (2) show that the sub-section is to be construed strictly, and the whole question is highly technical. The conclusion at which I have arrived is that, before the sub-section operates, you must find in the will to be construed a direction that the property is to be held upon trusts corresponding to trusts affecting land. In other words, there must be a use of the actual words mentioned in the sub-section.

They are not used in the will before me, and therefore, in my judgment, the sub-section does not apply, with the result that the first question must be answered by saying that the testator's residuary estate is, from the death of the testator's wife, to be held upon the trusts mentioned in clause 1 (*a*) of the originating summons.

Solicitors: *Bridges, Sawtell & Co.; E. G. & J. W. Chester.*

(1) [1928] Ch. 579.

(2) [1933] Ch. 208.

E. K. C.

MAUGHAM J.

1933.

Nov. 15.

CROMWELL PROPERTY INVESTMENT COMPANY, LIMITED *v.* WESTERN AND TOOVEY.

[1933. C. 1884.]

Mortgage—Proviso against enforcement before specified date if covenants performed—Notice by borrower to redeem in three months—No completion on date fixed in notice—Further notice or interest in lieu thereof.

A company, in consideration of 25,000*l.*, executed on October 5, 1931, in favour of two lenders, a mortgage containing a clause providing that if the company paid interest at the rate of 5½ per cent. per annum within fourteen days after the several days on which it should fall due and performed and observed all the covenants and stipulations in the mortgage to be performed and observed by it, save that for repayment of the principal sum, the lenders would not enforce repayment before October 15, 1936, the principal sum being deemed to be due for the purposes of the exercise of the statutory powers on March 25, 1932. On August 11, 1932, the company, in consideration of 24,000*l.*, executed in favour of the same lenders and in respect of different property, a mortgage containing a like clause, in which the lenders agreed not to enforce repayment before September 29, 1937, the principal sum being deemed to be due for the purposes of the exercise of the statutory powers on December 25, 1932.

In the course of correspondence the lenders, in answer to the company, wrote that they would be prepared to accept repayment of both sums "on reasonable notice." On January 23, 1933, they wrote that they would be prepared to accept three months' notice, and on January 24 the company wrote giving notice of intention to pay off the mortgages on April 25. On April 20, during a telephone conversation between clerks of the company's solicitors and the lenders' solicitors, it was made clear that completion would not take place on April 25, and the lenders' solicitors' clerk acquiesced and asked to be informed when it would take place as soon as the company's solicitors knew. It did not take place on April 25, and on that date the lenders' solicitors wrote informing the company's solicitors that as the mortgages had not been redeemed in accordance with the notice interest in lieu of notice would have to be paid on completion; and on April 27 they wrote that the lenders would accept interest up to the actual date of repayment, plus three months' interest in lieu of notice, if redemption took place "not later than Thursday of next week." On May 10 the lenders' solicitors refused the company's solicitors' tender of a sum representing principal and interest to date on both mortgages:—

Held, (1.) that nothing in the mortgages freed the company from the rule of equity that six months' notice must be given of intention to pay off a mortgage, or six months' interest in lieu thereof be paid;

(2.) that when failure to pay off on the date fixed in the notice is unexplained, a new notice must be given or interest in lieu thereof be paid, but that the new notice need not in every case be six months' notice;

(3.) that in the present case only a "reasonable notice" was required after April 25, 1933, and that three months was a "reasonable notice."

Fitzgerald's Trustee v. *Mellersh* [1892] 1 Ch. 385 considered.

Dictum of Pearson J. in *In re Moss* (1885) 31 Ch. D. 90, 94 as to the right of a mortgagee, in default of payment off on the day appointed by a mortgagor in a notice for payment off, to a further six months' notice or interest in lieu thereof, followed.

Observations on the rule of equity as to the giving of six months' notice to pay off a mortgage or the payment of six months' interest in lieu thereof.

WITNESS ACTION.

This action raised the question whether a mortgagor who had given, in accordance with the proviso for redemption in the mortgage, notice to redeem and had failed to redeem at the end of the period of notice was bound to give a fresh six months' notice or to pay interest in lieu thereof.

By a legal charge dated October 5, 1931, and made between the Cromwell Property Investment Company, Ld. (hereinafter called "the company"), of the one part and Thomas Western and Walter Toovey (therein called "the lenders" and hereinafter called "the defendants") of the other part and hereinafter called "the first mortgage," the company, in consideration of 25,000*l.* paid to it by the defendants, covenanted with the defendants to pay to them on March 25, 1932, the said sum with interest to date at the rate of 5½ per cent. per annum and thereafter to pay interest thereon at that rate on such part of that sum as should be for the time being unpaid: and the company charged by way of legal mortgage all the premises comprised in and demised by a lease, dated April 30, 1931, and made between the Ecclesiastical Commissioners for England of the one part and the defendants and William Thomas Western and Ernest Walter Toovey of the other part, and known as 2–60 (even numbers) Clarendon Court, Sidmouth Road, in the parish of Willesden in the County of Middlesex, which premises, by an assignment bearing even date with but executed before the first mortgage and made between the defendants and the said William Thomas Western and Ernest Walter Toovey of the one part

MAUGHAM J. 1933 CROMWELL PROPERTY INVESTMENT Co. v. WESTERN & TOOVEY.

and the company of the other part, became vested in the company for the residue of the term of 99 years from December 25, 1929, granted by the lease.

Clause 3 of the first mortgage provided: "If the said sum of 25,000*l.* shall be paid to the lenders on the 25th day of March next with interest thereon in the meantime at the rate of 5½ per cent. per annum, the lenders will at the request and cost of the company discharge this security."

Clause 5, sub-clause 3, provided: "If the company shall pay the interest on the said sum of 25,000*l.*, at the rate of 5½ per cent. per annum within 14 days after the several days on which the same shall fall due (as to which time shall be of the essence of the contract) and shall perform and observe all the covenants and stipulations herein contained and on the part of the company to be performed and observed other than the covenant for repayment of the said principal sum of 25,000*l.* then and in such case the lenders will not take any steps whatsoever for enforcing payment of the said sum of 25,000*l.* or any part thereof before the 15th day of October, 1936. Provided always that for the purpose of the exercise of the statutory powers the said principal sum shall be deemed to be due on the 25th day of March next."

By a legal charge dated August 11, 1932, and made between the company of the one part and the defendants (therein called "the lenders") of the other part and hereinafter called "the second mortgage," the company, in consideration of 24,000*l.* paid to it by the defendants, covenanted with the defendants to pay them on December 25, 1932, the said sum with interest to date at 5½ per cent. and thereafter to pay interest thereon at that rate on such part of that sum as should be for the time being unpaid and as beneficial owner charged by way of legal mortgage all the premises comprised in and demised to the company for 99 years from December 25, 1929, by a lease dated August 11, 1932, and made between the Ecclesiastical Commissioners for England of the first part, the said Thomas Western of the second part and the company of the third part and known as 62–120 (even numbers) inclusive Clarendon Court aforesaid.

Clause 3 and clause 5, sub-clause 3, of the second mortgage contained provisions similar to those in clause 3 and clause 5, sub-clause 3, respectively of the first mortgage, and the last part of clause 5, sub-clause 3, of the second mortgage provided: " . . . . the lenders will not take any steps whatsoever for enforcing payment of the said sum of 24,000*l*., or any part thereof before the 29th day of September, 1937. Provided always that for the purpose of the exercise of the statutory powers, the said principal sum shall be deemed to be due on the 25th day of December next."

On January 19, 1933, the company wrote to the defendants: " . . . . It is possible that by incurring considerable legal costs we might be able to obtain a mortgage on this property at possibly 5 per cent. interest, instead of the higher rate of interest that we are paying to you. We shall be glad if you will kindly let us know whether you would be willing, in the event of our being able to arrange another mortgage, to accept repayment of your mortgages with, of course, interest to the date of repayment." On January 20 the defendants wrote: " . . . . with regard to you (*sic*) being able to get a mortgage at 5 per cent. we should be prepared to accept your money providing we get a reasonable notice." On January 21 the company wrote: " . . . . We note that you are willing to accept your (*sic*) money providing you get reasonable notice. May we enquire on what date you would be willing to accept the money? We suggest that if we were to repay you on the next quarter day, the 25th March, 1933, that (*sic*) this might be a convenient arrangement from every point of view." On January 23 the defendants wrote: " . . . . We are prepared to accept three months' notice from the date you write and tell us that the amount will be paid off." On January 24, the company wrote: " 2–120 (even numbers) Clarendon Court, Sidmouth Road, Brondesbury . . . . We hereby give you notice of our intention to pay off this mortgage (*sic*) on the 25th April, 1933." On March 17 the company's solicitors wrote to the defendants' solicitors: " Our clients are arranging for a new mortgage on this property and the mortgagee's solicitors, Messrs. Peake & Co., of 6 Bedford

Row, W.C., are desirous of inspecting the deeds. Will you please, therefore, be good enough to produce the deeds to Messrs. Peake & Co., and forward us the note of your charges." On March 18, the defendants' solicitors wrote to the company's solicitors: " We are in receipt of your letter of yesterday's date and are obtaining the deeds of the property from our client (*sic*). As soon as we receive them we will communicate with Messrs. Peake & Co. and arrange for an appointment with them to accept the same." On March 20, Messrs. Peake & Co. wrote to the defendants' solicitors giving a list of deeds, and said: " . . . . We understand that Messrs. Wedlake, Letts & Birds " (the company's solicitors) " have arranged for you to produce these deeds to us, and we propose to call upon you to-morrow at 2.15 to inspect them. Perhaps you will telephone us early to-morrow morning if the deeds are available." On April 19, the defendants' solicitors wrote to the company's solicitors: " The amount required to redeem the mortgage on the above property is 49,171*l*. 13*s*. 4*d*. . . . . Our costs will, of course, have to be paid in addition to the above. If you will let us have a definite appointment to complete, we will let you have a note of our costs. We enclose herewith Income Tax Voucher which we require to be signed on behalf of your clients. We shall be glad if you will kindly telephone us to-morrow (Thursday) morning, and confirm that you desire us to have statutory receipts executed by our clients." On April 20, the company's solicitors' conveyancing clerk made a statement by telephone to the defendants' solicitors' conveyancing clerk to the effect that the intending new mortgagee required, not the execution of statutory receipts, but transfers of the first and second mortgages, and that he proposed to have a consolidating mortgage, that various documents would have to be settled, submitted for approval to the defendants' solicitors and sent back for engrossment and execution, and that the final step would be the execution of the transfers in exchange for the sum of 49,171*l*. 13*s*. 4*d*. and any other sums that were required. He said also that the company could not do all that was necessary in the time at its disposal and made it clear that completion would not take place on April 25, in accordance with the notice. The defendants' solicitors' conveyancing clerk then said, in effect: "Very well, let me know when you have got things fixed up." He did not give any warning of the effect of the course which he had been told would be taken. On April 25, the defendants' solicitors wrote to the company's solicitors: "Referring to our conversation over the telephone of the 20th inst., we have been expecting to hear from you with reference to this matter. Will you please let us know the present position? You will, of course, appreciate that as the mortgages have not been redeemed to-day in accordance with the notice given, interest in lieu of notice will have to be paid on completion." On April 26, the company's solicitors wrote to the defendants' solicitors: " . . . . We have now received from the new mortgagee's solicitors draft transfers of mortgage which we enclose herewith for approval on behalf of your clients. . . . . We are much surprised at the second paragraph of your letter. We have never had the point raised before and it is, of course, impossible to ensure that a matter will be completed on the actual date that the notice expires. Our clients, of course, are prepared to pay interest up to the date the mortgage is actually transferred and we do not think that your clients can ask for more than this. . . . ." On the same date, the defendants' solicitors wrote to the company's solicitors: " . . . . we would point out that where a mortgagor gives notice to redeem and does not in fact redeem in accordance with such notice, the mortgagee is entitled to a fresh notice or interest in lieu thereof. Without prejudice, however, we are taking our clients' instructions." On April 27, they wrote: "Referring to our letter of yesterday's date, we have been in communication with our clients with regard to payment of interest. Without prejudice to their rights, our clients are prepared to accept interest up to the actual date of repayment plus three months' interest in lieu of notice, provided the redemption takes place not later than Thursday of next week."

After further correspondence, the company's solicitors, on May 10, tendered to the defendants' solicitors the sum of

49,254*l.* 14*s.* 8*d.* in respect of principal and interest on both mortgages. That tender was refused by the defendants' solicitors. On May 18, the amount of six months' interest to which the defendants claimed to be entitled in lieu of notice was placed on deposit at a bank in the joint names of representatives of the company's and the defendants' solicitors, to await the result of proceedings to be taken by the company, and it was agreed that the successful party to the proceedings should be entitled to that amount, together with bank interest thereon. On May 19 the writ was issued in this action, by which the company claimed a declaration that it was entitled to redeem the mortgages on payment to the defendants of the aggregate principal sum of 49,000*l.*, together with the defendants' solicitors' costs and interest up to the date of the expiration of the notice to redeem, and with further interest from that date to the date on which tender was made and refused, without being bound to give the defendants a further notice of six months as from the date of the expiration of the notice, or to pay to them six months' interest in lieu thereof. The company claimed also a declaration that the sum on deposit at the bank belonged and ought to be released to the company together with any deposit interest thereon.

Gover K.C. and *R. R. Formoy* for the company. The question to be decided is whether tender by the company of principal together with interest to date was enough or whether six months' interest in lieu of notice should have been tendered. In Burton's Cases with Opinions (1791), vol. ii., p. 51, it is made clear that the reason for the rule of equity that the mortgagor must give six months' notice to pay off or pay six months' interest is " to enable the mortgagee to provide another place " for his money. At the present time it does not take six months to find suitable new investments : that reason for the rule cannot, therefore, be said to be an adequate reason now. In *Burrowes* v. *Molloy* (1) the headnote states that " . . . . The proviso for redemption in a mortgage of a leasehold for years was, that upon payment of the principal on a day mentioned, and interest thereon, and the head rents in the meantime, the deed should be void. By deed of equal date, reciting that the agreement of the parties was, that the principal should not be called in until after the decease of the mortgagor, but that, by mistake, it was stated in the mortgage deed that the principal might be called in on a day certain, the mortgagee covenanted that the principal money should not be called in until after the decease of the mortgagor; anything in the deed of mortgage to the contrary notwithstanding. *Held*, that the mortgagee could not foreclose the mortgage during the life of the mortgagor, though the interest was in arrear, and the mortgagor had not paid the head rent." In *Seal* v. *Gimson* (1) a mortgagee who had agreed not to call in the principal for five years if the covenants were punctually performed gave notice calling it in on the ground of certain breaches, the last of which had occurred about eighteen months before he gave the notice. During those eighteen months interest had been punctually paid, and it was held that that fact was receivable in evidence in determining whether the mortgagee had waived his right to call in the principal before the five years had passed and that he had waived that right. In *Maclaine* v. *Gatty* (2) the question arose whether the mortgagee had made default in payment of interest with the result that he had put an end to the mortgagees' covenant not to call in the principal, and it was held that he had. In *In re Moss* (3) Pearson J., in the course of his judgment, said: " . . . . the contention is that the mortgagees agreed to accept payment on the 1st of July, and that, as the money was not paid to them, they are entitled to a fresh six months' notice, or to six months' interest in lieu of notice. No doubt that is the ordinary rule when a mortgagor gives notice to pay off the mortgage, and he does not make the payment on the appointed day. And the principle of the rule is this that, if the mortgagor fails to make the payment on the appointed day, there is no *constat*

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(1) (1845) 2 Jo. & Lat. 521.

(1) (1914) 110 L. T. 583. (2) [1921] A. C. 376.
(3) 31 Ch. D. 90, 94.

when the mortgagee will get his money, and he will be unable to make any arrangement for its investment." In *Bishop* v. *Church* (1) Lord Hardwicke L.C. said: "There are several instances of mortgages, where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment; yet if a strict tender is not made, the court cannot stop the interest: though cases may be, where the court wish to do it: that of acting a more generous kind part, if mortgagee had taken it, is not what the court is to go by." That amounts simply to a statement that, in order for a strict tender to be constituted, there must be a tender at the proper time and in the proper place and manner. A mortgagor who has made default in paying off on the legal date for payment off comes within the ordinary principle that six months' interest must be paid. In Powell on Mortgages, 6th ed., vol. ii., p. 934, there is a very curious reference, on this point, to a dictum of Lord Hardwicke L.C., and at the beginning of the volume is a table which shows that it was also in the fourth edition, which was published in 1799. To the passage containing the reference there is a side-note stating that "Tender suspends interest, if six months notice of payment of principal has been given to mortgagee," and the passage indicates that tender does not suspend interest if that notice is not given, and refers to a decision of Lord Hardwicke L.C. to that effect. The reference at the end of the passage is only to a note by Thomas Coventry, the editor, and gives no authority for the statements in the passage: but under the letter (*d*) reference is made to *Hix* v. *Ling*, (2) a case which came before Lord Hardwicke; that is probably the case to which Mr. Powell was referring, but there is no other report of it.

In the present case the defendants could not enforce the mortgages before the respective dates fixed so long as interest was punctually paid. Up to the date of giving notice to pay off the company had always paid punctually, and therefore was not, in equity, bound to give the defendants any notice. Even though the company did not pay off on the date fixed in the notice, it is not bound to give a further six months'

(1) (1751) 2 Ves. Sen. 370, 372.

(2) Unreported.

notice to pay off. Failure to pay off on the date fixed took place in circumstances which gave the company reason to assume that the defendants recognized that a few days' grace for conveyancing purposes was sufficient and proper. It would therefore be inequitable for the Court to insist on the amount on deposit being paid out in full to the defendants.

Evershed K.C. and *G. P. Slade* for the defendants. "Default" means default in complying with the proviso for redemption. If that contention is accepted, no further difficulty arises on this point : *Fitzgerald's Trustee* v. *Mellersh.* (1)

Gover K.C. in reply. *Wilkinson* v. *Hall* (2) was a case in which a mortgagor mortgaged land with a proviso for redemption on payment of the principal on a specified date, it being agreed that, on regular payment of interest meanwhile, the lender should not call in the principal until seven years after that date and that the mortgagor, until he defaulted in payment of principal and interest, should hold the mortgaged premises, and take their rents, issues and profits for his own use. It was held that that operated as a re-demise to the mortgagor until the date seven years later than the date fixed for payment of the principal.

G. P. Slade in reply on *Wilkinson* v. *Hall.* (2) The present case must depend on the construction of the mortgages and is not affected by *Wilkinson* v. *Hall.* (2)

Maugham J. This case is a somewhat curious one, and I am glad to think it does not often arise in connection with the payment off of a mortgage. [His Lordship then stated the facts and in the course of the statement said :] I would observe that there is no statement by the defendants that reasonable notice is required only if they get that notice at once, or that they will accept the three months' notice only if that notice is complied with within a week. In these days I think it is true to observe, as counsel for the company observed, that you can get suitable investments in far less than six months' time, and, although I do not intend to interfere with what I believe to be the strict rule in equity

(1) [1892] 1 Ch. 385.

(2) (1837) 3 Bing. N. C. 508.

with regard to giving, in certain cases, six months' notice, or paying six months' interest in lieu of notice, I would express the opinion that the term is a harsh one, and it would not be surprising if the Legislature thought fit to alter that rule.

[After stating the facts his Lordship continued :] The defendants claim that the company is bound to pay six months' interest in lieu of notice because of the delay in being ready for completion at the date fixed at the end of the three months' notice although that notice was given by consent and with the acquiescence of the defendants. I confess I think that is not a step of which this Court can approve. It does not seem to me to be right to make such a claim in the circumstances of the case. But of course I have to deal with the matter in accordance with the recognized principles of equity jurisdiction and I shall now proceed to consider the arguments that have been put forward on the questions which are involved.

The first point that is raised by counsel for the company depends on clause 5, sub-clause 3, which I have already read. The contention is that, inasmuch as the defendants were precluded from taking any steps whatever for enforcing payment provided the interest was paid within fourteen days, there was in fact, at the date when the company desired to pay off the mortgages, no default whatever, and accordingly that there was no rule in equity which compelled the company to give six months' notice or any notice to the defendants. On that I have been taken through practically all the authorities which bear on the matter. There is some interest, I think, attaching to the earliest of those authorities although it is only in a book called "Cases with Opinions." The book is stated on the title page to be "Cases with Opinions of Eminent Counsel in matters of Law, Equity and Conveyancing," and in the second volume at page 51 there is the opinion of a counsel, who was eminent in the year 1791, upon certain points respecting the payment of money secured by mortgage. He points out that " . . . . a mortgagee may call in his mortgage money when he pleases, and may require it to be paid at as short a warning as he pleases "—that is, subject to modern limitations. Then, after having explained that and explained the effect of the law, he goes on to say: "But the mortgagor is not in the same situation: he cannot compel the mortgagee to take his money at a moment's warning; he must give the mortgagee six months' notice to recover it; or, which is the same thing, pay him six months' interest in advance;"—then comes the reason—"because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist unless he will do equity: and the court holds, that it is equitable that the mortgagor shall give six months' notice of paying in the money, to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice. . . . ."

That statement has been referred to in one or two cases and in one or two text-books, and there are a number of other authorities which bear upon the point; but the next one to which I shall refer is a decision of Chitty J. in *Fitzgerald's Trustee* v. *Mellersh*. (1) He states the rule to be found in Coote on Mortgage, 1st ed., p. 553, and the rule as in Fisher on Mortgages, 4th ed., p. 734, and he concludes that (where the loan is a permanent one) the rule that the mortgagor must give six calendar months' notice to pay off is one which applies in every case where the mortgagor has made default in payment of the money according to the proviso in the mortgage deed. I will state the proposition as it appears in Fisher and Lightwood's Law of Mortgage, 7th ed., p. 611. It is as follows: "After default, the mortgagee is generally entitled to notice before his security is discharged by payment; the reason is said to be that the mortgagor having lost his estate at law and being only entitled to redeem in equity, must do equity by allowing a reasonable opportunity for the mortgagee to find a new security for his money; for which six months is treated as the proper time. But if the mortgagee demands his money, or . . . . takes proceedings to realise his security — which amounts to a demand — notice will be unnecessary, whether the period for payment has arrived or not, and it is the same where the mortgagee has taken possession, this also being in effect a demand for payment." I think the rule, therefore, must be taken as a settled rule of practice that, after default has been made in payment of the principal and interest in accordance with the proviso for redemption, the mortgagor must in general give the mortgagee six calendar months' notice.

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(1) [1892] 1 Ch. 385, 388.

Counsel for the company contends that clause 5, sub-clause 3, in the mortgages, which I have read, is sufficient to qualify the proviso for redemption so that there is no default by the company, and that no notice need be given. In my opinion the rule has been that if the principal and interest is not paid at the date mentioned in the proviso for redemption the notice must be given, and I do not consider that I am justified in disregarding the form of the proviso for redemption on the ground that in substance the effect of it is widely modified by clause 5, sub-clause 3, in the mortgages. It seems to me that the two things can co-exist; that the covenant for payment is to pay six months after date, and that the proviso for redemption is if redemption takes place at that date; while there is a restriction placed on the power of the defendants so that on their side they are not able to take any steps for enforcing payment until a later day. The two provisions are intended to co-exist, because the company is intended to be entitled to pay off at an earlier date, with interest if necessary—that is to say, interest for the ordinary period of six months if the case is one where that can properly be demanded. In my opinion, therefore, the first point taken on behalf of the company fails.

The second point in effect amounts to this, that the rule is not an inflexible one and that, notice having been given to pay off, there is no obligation to give another six months' notice to the defendants because the precise date named in the first notice has passed by without payment. Here I think it is necessary to make a distinction arising from the facts. It seems to me reasonably clear that, if a mortgagor gives notice after default in payment in accordance with the time fixed in the proviso for redemption, and fails to make payment at the expiration of his six months' notice or any less notice which the mortgagee has agreed to accept, and nothing more happens, the mortgagee is entitled to treat the notice as a nullity, since the failure to pay may result from an inability to find the money, and since, in the case I have put, he has no guarantee whatever that in a few days the sum will be forthcoming. Accordingly, as a general rule, I accept as correct the observation, or the dictum, of Pearson J. in *In re Moss* (1) and I accept also the statement in a book once of great authority, Powell on Mortgages, 6th ed., vol. ii., p. 934, to this effect: "A mortgagee refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender. But then notice of paying off the mortgage must have been given to the mortgagee at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord Hardwicke not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made." The book refers to a case of *Hix* v. *Ling* before Lord Hardwicke, which is not, as I understand, anywhere reported.

As I have said, if notice is given and is not complied with, and there is no explanation—nothing to lead the mortgagee to suppose that some accident has caused a slight delay—it is reasonable to hold the view that in general a fresh notice, or a fresh payment of interest in lieu of notice, is requisite. I do not hold the view that in such a case there is a definite rule, whatever the facts may be, that another six months' notice is requisite. A fortiori do I not hold that view in the present case, where the defendants had stated that they were willing to accept a reasonable notice which they afterwards

(1) 31 Ch. D. 90, 94.

defined as a three months' notice. To my mind, all that equity requires is a reasonable notice, and in coming to that conclusion I think some weight should be given to the fact that, having said that they would accept a reasonable notice, and the solicitors having written the letter of April 19, 1933, which I have mentioned, and having been told that owing to an alteration in the conveyancing forms which were being adopted there would be a delay, no warning was given to the solicitors for the company that if the sum was not paid or tendered on the exact date six months' further interest in lieu of notice would be required. As I have said, I think that equity in such a case requires only a reasonable notice.

If the case had been one where the solicitors for the company had explained rather more clearly the position they were in and had fixed a date, we will say, a week from April 25, as the date when the money could be expected, and, a fortiori, if they had added: "If you will not accept notice to pay off on that day, being a short extension of the agreed day, we will make you a tender," I should then have been prepared to hold that the defendants were entitled to no more than interest up to the date fixed for the payment off of the mortgage. It is, however, true to say that after the telephone message of April 20, there is a silence not only until April 25, but even on April 26, when the draft transfers of the mortgages are forwarded to the defendants' solicitors, there is no definite statement of the date when the money will be forthcoming. All that is said is: "We are informed that it is the intention of the new mortgagees to take transfers of the existing mortgages and also a consolidating mortgage." Here I will state my view of the contention that there was a waiver of the delay by the conduct of the solicitors on behalf of the defendants in the circumstances of the case, which is that on the evidence given, no such conclusion can possibly be arrived at, nor was there anything in the nature of estoppel which could prevent the mortgagees from claiming such notice as they were entitled to.

I return to the question as to what was a reasonable notice which they might properly have required in the events which

I have stated in some detail. To my mind the maximum notice which it was fair for them to ask on April 20 or 25—on April 20, when they were told that owing to the change in the conveyancing forms adopted it was not convenient to complete on April 25, or on April 25, when at the close of the day a member of the firm of solicitors acting for the defendants signed his letter on behalf of those solicitors—was three months' notice. I do not take the view that, having regard to the silence of the company's solicitors in fixing a date, they were entitled to nothing more than interest up to the date of payment; but I think on the whole of the case, bearing in mind the defendants' offer to take a reasonable notice in the first instance and to accept a three months' notice, and the facts that I have stated, which arose when the company's solicitors pointed out that they required a little more time, it would be wholly inequitable for the defendants to require more than a three months' payment in lieu of notice.

[His Lordship was then informed during a discussion that it had been agreed that the sum which had been deposited in the joint names of the company and the defendants upon the footing that the defendants were entitled to six months' interest should be divided equally between the company and the defendants and that the action should be dismissed, and his Lordship thereupon dismissed the action with costs.]

Solicitors: *Wedlake, Letts & Birds; W. R. Bennett & Co.*

K. R. A. H.

EVE J.
1933
July 19.

In re PRUDENTIAL ASSURANCE COMPANY'S TRUST DEED.

HORNE *v.* PRUDENTIAL ASSURANCE COMPANY, LIMITED.

[1933. P. 1464.]

Restraint of Trade—Assurance Company—Trust deed—Pension scheme—Condition against pensioner entering competing business—Cesser of pension—Validity of scheme.

A pension scheme established by a trust deed for the benefit of employees of an assurance company, to which the company contributed a large annual sum, and employees entering after a certain date sums calculated as a percentage of their wages, contained a clause providing that a pension should cease if the pensioner should engage in or be connected with any business competing with that of the company. In that event the pensioner (if a contributor) could have his contributions, less any amount already received by him as pension, returned to him:—

Held, that whether or not the clause was invalid or unenforceable, its inclusion had no effect in invalidating the scheme, which was perfectly valid.

Wyatt v. *Kreglinger & Fernau* [1933] 1 K. B. 793 distinguished.

ORIGINATING SUMMONS.

By a Trust Deed dated December 24, 1918, and made between the Prudential Assurance Company, Ld. (hereinafter called "the Prudential"), of the one part and Frederick Schooling, James Moon, Alfred Corderoy Thompson, Sir George Ernest May, K.B.E., and Ernest Dewey (thereinafter called "the Trustees") of the other part, after reciting that under a resolution of the directors of the Prudential dated December 28, 1916, authority had been given to institute a staff pension scheme, and that in accordance with such authority two several sums of 100,000*l.* had been paid to the Trustees and that the Prudential proposed to institute the pension scheme set out in the second schedule to the deed now in recital, and that the directors of the Prudential had by a resolution dated December 24, 1918, expressed their intention that the Prudential should make an annual payment to the said fund of 350,000*l.* for thirty years, if the funds of the Prudential permitted, in addition to certain other contributions, the Prudential thereby covenanted with the Trustees to pay to them certain contributions in accordance with the scheme, and the Trustees were to hold such contributions and the other moneys and securities therein mentioned upon and subject to the trusts and powers declared by the said scheme and by that deed. The deed further provided that the Trustees might vary or alter the trusts thereof, so as to give effect to any variations or modifications of the said scheme. The deed also contained an investment clause providing for the investment of all moneys not immediately required for the purposes of the scheme upon any of the securities therein mentioned.

The scheme contained in the schedule provided that every person who should enter the service of the Prudential on and after January 1, 1919 (thereinafter called "contributors") should accept the scheme as a term of his employment. By Part 2 of the scheme it was provided that every contributor should contribute to the fund according to the scale therein mentioned, being normally 3½ per cent. on his salary, and by Part 3 provision was made for benefits upon the scale therein mentioned by way of pension and death benefit to be paid to contributors, to existing pensioners and existing employees who were not bound to pay any contributions under the scheme, and certain conditions therein laid down regulated the amount of the payments, and the terms on which they should be made or continued.

One of such terms was to be found in clause 21, which was as follows:—"A pension shall cease and determine if the pensioner shall directly or indirectly engage in or be connected with any business occupation or pursuit in competition with or adverse to the Prudential and in such case the pensioner (if a contributor) shall be entitled to require the contributions actually made by him to the fund after deducting therefrom the amount received by him in respect of his pension to be repaid but without interest thereon."

By Part 4 of the scheme provision was made for vesting the fund in trustees, of whom the first were parties to the Trust Deed.

By reason of the inclusion in the scheme of para. 21, and particularly having regard to the decision of the Court of Appeal in *Wyatt* v. *Kreglinger & Fernau* (1), it was suggested that there might be a doubt whether the scheme remained valid and binding to the full extent, and owing to the large sum of money involved in the scheme, the plaintiffs as the present trustees of the above deed took out this summons to obtain the opinion of the Court as to the validity of the scheme.

The summons asked (1.) whether having regard to the provisions of the staff pension scheme constituted under the trusts of the said indenture and upon the true construction thereof, and in particular of clause 21 thereof, the plaintiffs as such trustees were entitled and ought to continue to collect from the defendant company and the contributors mentioned in the scheme the contributions therein mentioned and to apply the same in accordance with the provisions of the scheme, and (2.) whether having regard to the provisions of clause 21 thereof and upon the true construction thereof the scheme was valid and effectual, and if invalid, whether in whole or in part, and if in part to what extent, and whether the scheme ought to be determined.

The defendants to the summons were the Prudential and four employees and pensioners chosen to represent different classes of beneficiaries under the scheme.

Spens K.C. and *H. S. G. Buckmaster* for the plaintiffs. The scheme affects thousands of persons who submit to deductions from their wages. The Trustees are anxious to obtain a decision on the validity of the scheme, having regard to the decision in *Wyatt* v. *Kreglinger & Fernau* (1), and the possibility that clause 21 might be held to be void, as being in restraint of trade, and the effect on the scheme generally, if it should be void. A clause of this nature is one very commonly found in the pension schemes of large businesses. Any pensioner who chooses to transfer his services to another insurance company is at perfect liberty to do so, only in that case he loses his pension. We submit that the scheme is valid.

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(1) [1933] 1 K. B. 793.

[Counsel referred to the judgments in *Wyatt* v. *Kreglinger & Fernau.* (1)]

R. S. King-Farlow for the Prudential Company. I submit that clause 21 is valid. There is a distinction between a clause like this in a trust and in a service agreement, as in *Wyatt* v. *Kreglinger & Fernau.* (1)

If a man chooses to enter a competing business he has no right to continue to draw funds or a pension as a member of his employers' original scheme. If he obtains work elsewhere, he does not need a pension. The limitation is justifiable, and one made in the public interest.

All the leading cases on restraint of trade have been cases where an injunction has been asked for.

D. Ll. Jenkins for the defendant Canfield, representing the class of contributors under the scheme.

The scheme is perfectly valid, and is not invalidated by the inclusion of clause 21, whether that clause be valid or not. The matter is one of trust and not one of contract. A limitation in a will subject to an invalid condition is not of itself invalid.

J. F. Bowyer for three defendants representing existing employees not contributors, existing pensioners, and pensioners under the scheme.

EVE J. I have come to the conclusion that the scheme is valid, and that the Trustees ought to go on administering it in accordance with the terms of the trust, leaving the question as to the validity of clause 21 to be decided in future, if and when it should arise. The present case differs altogether from that of *Wyatt* v. *Kreglinger & Fernau* (1), because here I have not to determine the result of contractual relations between employer and employed, but to decide whether the introduction of clause 21 into the trusts of this fund, which is vested in Trustees for the benefit of a large number of beneficiaries, has the effect, assuming it to be unenforceable, of invalidating the whole of the valid trusts which are contained in the scheme. To hold that this would be the effect of it would

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(1) [1933] 1 K. B. 793.

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PRUDENTIAL ASSURANCE CO.'S TRUST DEED, *In re.*
HORNE *v.* PRUDENTIAL ASSURANCE CO.

be a very extravagant view to adopt. As has been pointed out, the clause is not unlike the limitations or conditions which are imposed in an endeavour to limit antecedent gifts in a trust contained in a settlement or will. Those conditions are not infrequently void, but that does not affect the beneficial interest except to free it from the burden or the control which the conditions have been framed to impose upon it. I think the present scheme is of a nature which it is impossible to say would be destroyed because one of the trusts or one of the conditions or clauses incorporated in the scheme is a condition or clause which, if legal steps were taken to enforce it, might be found to be unenforceable. I propose therefore to make a declaration that the inclusion of clause 21 in the scheme does not render the whole scheme invalid.

Solicitor: *H. H. Moseley.*

H. L. L.

CLAUSON J.
1933
May 11.

In re THOMPSON.

PUBLIC TRUSTEE *v.* LLOYD.

[1933. T. 589.]

Will—Construction—Legacy to be applied towards the promotion of fox-hunting—Validity—Absence of cestui que trust—Form of Order.

Where a legacy was bequeathed to G. W. L. to be applied in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting, the Court ordered that, upon G. W. L. undertaking to apply the legacy towards that object, the executors should pay him the legacy, with liberty to the residuary legatees to apply in case the legacy was not so applied.

Pettingall v. *Pettingall* (1842) 11 L. J. (Ch.) 176 applied.

ADJOURNED SUMMONS.

The testator, who was a member of Trinity Hall in the University of Cambridge and died on August 21, 1932, by his will made on December 14, 1904, bequeathed a legacy of 1000*l.* to his friend George William Lloyd to be applied by him in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting and devised and bequeathed his residuary estate to Trinity Hall in the University of Cambridge to be applied by the Master and Fellows thereof in such manner as they should deem best for the benefit of the college as therein more particularly mentioned.

This was an originating summons by the executors of the testator's will for the determination of the question whether the legacy was a valid bequest or failed for want of a definite object or for uncertainty or on other grounds.

Henry Johnston for the plaintiffs.

J. V. Nesbitt for the defendant G. W. Lloyd. The legatee makes no claim to any beneficial interest in the legacy and is anxious to carry out the testator's wishes so far as he is entitled so to do. This is not a trust for charitable purposes. The trust being one for the mere encouragement of a particular sport and not having for its object a general public purpose is not a charitable trust: *In re Nottage.* (1) True, there is no cestui que trust who can enforce the application of the legacy, but that is immaterial: *In re Dean.* (2) The object to which the legacy is to be applied is sufficiently defined to be enforced.

[CLAUSON J. The college, as residuary legatees, seem to have an interest in the legacy, as, but for the trust for its application, they would be entitled to it. The procedure adopted by Knight Bruce V.-C. in *Pettingall* v. *Pettingall* (3), cited in Jarman on Wills, 7th ed., vol. 2, p. 877, might be followed in this case.]

J. M. Paterson for Trinity Hall, Cambridge. The college, as the residuary legatees under the testator's will, are anxious that the wishes of the testator in respect to the legacy to his friend should be carried out; but being in the position of trustees they feel it to be their duty to submit that the bequest was not valid on the ground that there is no cestui que trust to enforce the trust; there must be somebody in whose favour the Court can decree performance: *Morice* v. *Bishop of Durham.* (1)

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(1) [1895] 2 Ch. 649.

(2) (1889) 41 Ch. D. 552.

(3) 11 L. J. (Ch.) 176.

CLAUSON J. The testator, who was a member of Trinity Hall, Cambridge, by his will dated December 14, 1904, bequeathed a legacy of 1000*l.* to his friend George William Lloyd, who is also a member of the same college, to be applied by him in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting. In the first place, it is clear that Mr. Lloyd is not entitled to the legacy for his own benefit nor indeed does he so claim it, but he is anxious to carry out the testator's expressed wishes, if and so far as he lawfully may do so. No argument has been put forward which could justify the Court in holding this gift to be a gift in favour of charity, although it may well be that a gift for the benefit of animals generally is a charitable gift: but it seems to me plain that I cannot construe the object for which this legacy was given as being for the benefit of animals generally. In my judgment the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given. The proper way for me to deal with the matter will be, not to make, as it is asked by the summons, a general declaration, but, following the example of Knight Bruce V.-C. in *Pettingall* v. *Pettingall* (2), to order that, upon the defendant Mr. Lloyd giving an undertaking (which I understand he is willing to give) to apply the legacy when received by him towards the object expressed in the testator's will, the plaintiffs do pay to the defendant Mr. Lloyd the legacy of 1000*l.*; and that, in case the legacy should be applied by him otherwise than towards the promotion and furthering of fox-hunting, the residuary legatees are to be at liberty to apply.

Solicitors: *Guscotte, Wadham, Tickell & Co.; Gray & Dodsworth; Saville & Mannooch.*

(1) (1805) 9 Ves. 399, 405.

(2) 11 L. J. (Ch.) 176.

H. C. H.

In re SHEE.

CLAUSON J.

TAYLOR *v.* STOGER.

1934
Jan. 11.

[1933. S. 3913.]

Settled Land—Administration—Tenant for Life and Remainderman—Capital or Income—Short Leases—Damnosa hereditas—Payment by Executors during Executor's Year of rent and other outgoings in respect of short Leases —Payment of sums to Assignees to relieve the estate of liabilities thereunder.

When part of the residuary estate of a testatrix who died on March 24, 1932, consisted of two houses held on lease for terms expiring in 1944 and 1945 respectively and subject to the payment of heavy ground rents and other liabilities; and, before the expiration of the first year after the testatrix's death, the executors, in pursuance of their obligations under the leases, expended 353*l.* in payment of rent and other outgoings; and, for the purpose of relieving the estate from future liabilities thereunder, acting under proper advice assigned the leases and paid out of the capital of the estate the sums of 500*l.* and 100*l.* to the respective assignees thereof in consideration of their undertaking those liabilities:—

Held, first, that, as between tenant for life and remainderman under the trusts of the residuary estate, the remainderman was not entitled to have the whole of the sums of 500*l.* and 100*l.* recouped to capital out of the income accruing to the tenant for life, although the effect of that payment out of capital was to relieve the tenant for life from the obligations he would have been under to meet out of income the liabilities under the leases, but for the assignment thereof: secondly, that the obligation to pay the sum of 353*l.* ought not to be wholly borne by the tenant for life, as he was not put in possession of any of the income of the residuary estate until the estate had, within the due period of one year from the testatrix's death, been freed from the leasehold liabilities: but, thirdly, those three sums amounting together to 953*l.* ought to be apportioned as between capital and income upon the principle recognized in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295.

In re Owen [1912] 1 Ch. 519 distinguished.

THE testatrix gave her real and personal property to trustees for sale and conversion into money, and after payment thereout of her debts, etc., upon trust to invest the residue of such moneys and to stand possessed of her residuary estate upon trust to pay the income thereof to her sister during her life, and after her decease to the testatrix's nephew during his life, and after the death of the survivor of them to divide the estate equally between the children of the nephew who should attain the age of 21 years, with remainders over. The will contained power for the trustees to postpone the sale and conversion, the whole of the income of the unconverted parts of the estate, whatever might be the nature thereof and whether wasting or otherwise, to be applied in the same manner as if the same were income from authorized investments.

The testatrix died on March 24, 1932, leaving property of the value of about 11,000*l.* Part of her estate consisted of two leasehold houses, one in Eaton Square and the other in Eaton Row, held for terms expiring in 1944 and 1945 respectively, and subject to heavy ground rents and other liabilities.

During the first nine months after the testatrix's death, that is up to the end of December, 1932, her executors spent 353*l.* on rents, taxes, rates, insurance, and other outgoings payable in respect of those houses. As there was not sufficient income of the estate to meet that expenditure, part of it was paid out of capital. At the end of December, 1932, the executors, acting on proper advice, assigned the leases, and paid out of the capital of the estate 500*l.* and 100*l.* to the assignees thereof respectively as consideration for their undertaking the liabilities thereunder.

This summons was taken out by the executors raising the questions: (1.) Whether the sum of 353*l.* so expended by them was properly chargeable against the income of the estate, and, if so chargeable, whether only against the income which accrued during those nine months or against income accrued or to accrue thereafter; and (2.) whether the sum of 600*l.* (*a*) ought to be discharged wholly out of capital or wholly out of accrued and future income; or (*b*) partly out of capital and partly out of income, and, if so, in what proportions, and (*c*) whether so much of that sum as ought to be discharged out of income ought to be discharged by quarterly, half-yearly or yearly instalments over any and what period.

A. H. Droop for the plaintiffs.

E. G. Wright for the infant son of the testatrix's nephew contingently entitled in remainder to the capital of the residuary estate. Those three sums which were paid by the executors in respect of the leasehold houses were outgoings which ought to be borne by income. The leaseholds formed part of the residuary estate of which the defendant Alfred Stoger is tenant for life: *In re Owen.* (1) The tenant for life ought to be ordered to recoup out of subsequent income the 353*l.* or so much of that sum as was provided out of capital to defray liabilities under leases which formed part of the testatrix's residuary estate: *Honywood* v. *Honywood.* (2) Upon the question whether income or capital ought to bear the liability to pay the two sums of 500*l.* and 100*l.* paid by the executors to free the estate from the future liabilities under the leases there is no authority: but it is submitted that those two sums are payable out of income by instalments spread over the respective periods during which the leases had to run.

H. O. Danckwerts for the defendant the tenant for life. The residuary estate of the testatrix to the income of which the tenant for life was entitled was not ascertained until these sums amounting in all to 953*l.* had been paid by the executors to clear the estate. What the tenant for life is entitled to is the income of the clear residue of the estate after the estate had been fully administered. The tenant for life had no interest in the specific leaseholds which, when the residuary estate was ascertained, formed no part of that estate: *Lord Sudeley* v. *Attorney-General* (3); *Barnardo's Homes* v. *Special Income Tax Commissioners.* (4)

In adjusting the liability for the payment of those sums as between tenant for life and remainderman the proper principle to be applied is that which was recognized in *Allhusen* v. *Whittell.* (5) The fact of the leasehold liabilities being contingent will not prevent the application of that principle: see *In re Poyser* (6), where Parker J. applied the principle of

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(1) [1912] 1 Ch. 519.
(2) [1902] 1 Ch. 347.
(3) [1897] A. C. 11, 13, 18.
(4) [1921] 2 A. C. 1, 8, 10, 11.
(5) L. R. 4 Eq. 295.
(6) [1910] 2 Ch. 444.

Allhusen v. *Whittell* (1) to the payment of past and future instalments of an annuity which the testator was under covenant to pay.

CLAUSON J. This application raises a curious and interesting point. The testatrix, by a perfectly simple will, after certain specific bequests and legacies, gave all her real and personal property upon trust for sale and conversion, and after payment thereout and out of her ready money of her debts, funeral and testamentary expenses and the legacies, the trustees were to invest the residue of the moneys in authorized investments and to stand possessed of such investments and of all parts of her estate for the time being unsold, upon trust to pay the income thereof to her sister during her life, and after her death to pay such income to her nephew during his life, and after the death of the survivor of her sister and nephew, to divide the estate among the children of the nephew attaining the age of twenty-one years. Clause 6 is a clause in the familiar form authorizing the trustees to postpone the sale, calling in or conversion of all or any parts of the residuary estate for so long as they should think fit, and her trustees were not to sell or convert any reversionary interest until it should fall into possession, unless they should see special reason to the contrary ; and the testatrix declared that the whole of the income from the unconverted parts of her estate should, " (whatever be the nature of the property from which the same proceeds and whether such property is of a permanent or wasting character and as well during the first year from my death as afterwards) be applied in the same manner in all respects as if the same were income proceeding from investments hereby authorised no part thereof being liable to be retained as capital but that no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my Will." Then there was an investment clause which did not in fact authorize investments in short leaseholds.

The testatrix was entitled at the date of her death to two comparatively short leaseholds for terms expiring in each

(1) L. R. 4 Eq. 295.

case in 1944 or 1945. These leaseholds carried heavy ground rents and other liabilities, and there is no doubt that at the moment that the testatrix died, these leaseholds, so far from being an asset, were a liability. Now what happened was this. The executors had to make certain payments in respect of these leaseholds, and during the first nine months from the testatrix's death, the executors expended in fact on this property a sum of 353*l.* On taking the accounts of the estate during that period, it would appear that there was some income which was available to meet this 353*l.*, but it appears to be agreed that there was a deficiency of such income to meet the 353*l.* As at the end of December, 1932, that is to say, just about nine months after the death of the testatrix, the executors (and nobody questions the propriety of their action in the matter) were able to arrange for this damnosa hereditas to be taken over by persons in consideration of such persons being paid 600*l.* It is assumed that that transaction was effective and that the persons who took over the leaseholds will in fact bear the liability to indemnify the testatrix's estate, and that in effect that payment of 600*l.* put an end to the liability of the testatrix's estate in respect of those leaseholds.

In due course the debts and funeral expenses were paid, and there was an ascertained residue which was to be held by the executors, who thereupon became trustees in trust for the successive tenants for life and the remaindermen.

There can be no doubt, I think, of this : that if these leaseholds had not been sold, but the tenants for life had been content to accept the position of tenants for life under the will on the footing that these leaseholds were still retained, the tenant for life could not have objected to the obligations arising from time to time under the leases being met out of the income of the estate of which she was tenant for life. I speak of the first tenant for life only ; I do not propose to complicate the matter by considering what would have happened had the income of one tenant for life been insufficient to meet the liabilities and had she died at a time when some liabilities accruing during her life had not been met.

But what happened in fact was this. In the course of clearing the estate during the executors' year, these liabilities were in fact put an end to in the way that I have stated ; and the remaindermen are now suggesting that in some shape or form these obligations should be thrown upon the tenant for life, the remaindermen pointing out, and pointing out quite correctly, that this sum of 600*l.* has in effect purchased an increase of income for the tenant for life of the settled estate, because it has put an end to certain income obligations which would have operated to reduce the income which the tenant for life would get in respect of the settled estate. That is perfectly true. But the question is whether that justifies me in directing some recoupment to be made which would throw the 600*l.*, spent in the manner I have mentioned, upon the income of the tenant for life. There is no authority produced for the proposition that that 600*l.* can be thrown as such upon the income of the tenant for life, and having regard to certain authorities, which will be found cited in a decision of Byrne J. of *Honywood* v. *Honywood* (1) I confess I am not surprised to find that no authority has been produced which would justify me in throwing that 600*l.* upon the tenant for life, merely because it would appear that the course which the executors properly took in putting an end to their testatrix's obligation by paying this 600*l.*, has in fact operated, or will in fact operate, for the benefit of the tenant for life.

Now as regards the 353*l.* properly spent during the nine months that the executors did retain these leaseholds, it is suggested that that sum must be treated as an obligation to be borne by the tenant for life and recouped out of the income which accrued during that period of nine months from other parts of the estate, and, in so far as that income is insufficient, must be recouped out of subsequent income of the tenant for life ; and for that purpose, and in support of that contention, *In re Owen* (2), a decision of Neville J., is referred to. That decision does not seem to me to meet the case, because that is a decision which deals with the position where a tenant for life has been put into possession of his life tenancy on the footing that he is tenant for life of a total which includes the damnosa hereditas. In fact the tenant for life was not here put into possession of any income until the damnosa hereditas had within the due period of one year from the testatrix's death been cleared away.

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(1) [1902] 1 Ch. 347, 352.

(2) [1912] 1 Ch. 519.

In my opinion, Mr. Danckwerts, who appeared for the tenant for life, is right in suggesting that the matter must be dealt with by applying the principle of *Allhusen* v. *Whittell* (1) on the lines indicated by Parker J. in the case of *In re Poyser.* (2) It was suggested in that case that the principle of *Allhusen* v. *Whittell* (1) should be applied only in the case of debts which were at the testatrix's death actual and not contingent; but to that contention Parker J. refused to give effect. In that case Parker J. applied the *Allhusen* v. *Whittell* (1) principle to a future debt which was contingent upon the continuance in being of an annuity; and in my view, I ought to follow that decision and apply it when dealing with the discharging of liabilities which were contingent upon certain periods for payment of rents, and so forth, occurring before surrender of the leaseholds. In my view, Mr. Danckwerts is right in his suggestion that that is the principle to be applied, and accordingly the total sum, namely, 953*l.*, which has in fact been expended upon these leaseholds, ought to be borne upon the principle that a sum is to be ascertained which, when added to the interest upon it, at the rate for the time being produced by the estate for the period from the death of the testatrix to the date of actual expenditure, will amount to the sum expended: the sum so ascertained will be borne by capital and the excess of the expenditure over that sum will be borne by income. In the present case the tenant for life will probably agree without difficulty to a figure which will adequately give effect to the decision that I am pronouncing, the figure at issue being quite small.

The order I make will be the following: "The judge being of opinion that the 953*l.* ought to be apportioned between capital and income on the principle recognized in *Allhusen* v. *Whittell* (1), and the tenant for life by his counsel offering to bear 30*l.* as being properly chargeable against income, authorize the trustees to charge the balance, that is, the 923*l.*, against capital."

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(1) L. R. 4 Eq. 295.

(2) [1910] 2 Ch. 444.

Solicitors: *Taylor & Humbert.*

H. C. H.

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1933
Dec. 20.

In re RAGDALE.

PUBLIC TRUSTEE *v.* TUFFILL AND OTHERS.

[1933. R. 1555.]

Will—Trust to pay income of fund to two persons and "from and after their decease" capital and income to be paid to a charity—Predecease of one annuitant—Construction.

A testator devised and bequeathed the residue of his estate to the Public Trustee upon trust for sale and conversion and to pay one-half of the net income arising from the fund so created to R. and the other half to T., and "from and after their decease" to pay the principal as well as the income to a specified charity. R. predeceased the testator. The question arose whether there was an intestacy as regards R.'s share, and if not, whether it was payable, both capital and income, to the charity or whether R.'s share of income was payable to T. for her life:—

Held, that there was no intestacy. The clear intention of the testator was to benefit both R. and T. and, on the true construction of the will, the gift over to the charity did not take effect till the death of both the annuitants. The surviving annuitant was entitled therefore to the whole of the income from the fund.

ADJOURNED SUMMONS.

The testator, Arthur Ragdale, died on the 31st March, 1933. By his will dated March 11, 1930, he appointed the Public Trustee sole executor and trustee and after usual provisions for debts and expenses and certain specific legacies declared the following trust of the residue: "In Trust to pay one-half of the nett income interest or dividends arising therefrom to my sister-in-law Rose Thornton Ragdale for her life and the remaining half of the nett income interest or dividends to my cousin Florence Tuffill for her life and from and after their

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RAGDALE, In re.
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decease to pay the principal as well as the income to King Edward the VII.'s Hospital Fund for London." Rose Thornton Ragdale died on May 4, 1931, during the lifetime of the testator. The persons entitled to share in any property in respect of which the testator died intestate were the two children of Sarah Kelly, deceased, a paternal aunt of the testator. The question for determination was whether there was an intestacy and if not whether Florence Tuffill was entitled to the whole of the income or the Charity entitled immediately to both the income and capital representing the share of the deceased Rose Thornton Ragdale.

Henry Johnston for the Public Trustee.

Vernon for the first defendant. The principle is laid down in Theobald on Wills, Edn. 8 (Chap. XLI., s. II, para. 5) at p. 581 : "If the annuity is given to several for their lives as tenants in common with a gift over of the annuity as a whole after the death of the survivor, the effect may be to give the whole annuity to the survivor during his life, as the limitation for life shows, that the representatives of a deceased annuitant were not intended to take after his death. Thus, under a gift of an annuity to A and B to be equally divided between them for their lives with a gift over after the death of both, or after the death of the survivor, the survivor takes the whole for life." He referred to *Armstrong* v. *Eldridge* (1) : *Re Telfair ; Garrioch* v. *Barclay* (2) and per Sargant J. in *In re Stanley's Settlement*; *Maddocks* v. *Andrews*. (3) There is sufficient in the will to say that my client is entitled to the whole of the annuity for her life.

Richmount for the next of kin. There is an intestacy. The will is different from any other will. The capital is vested in the trustee as a whole and the income is divided into half shares. I submit that the testator having disposed of the income in half shares there was to be no survivorship, and it cannot be implied from the will that the survivor had an interest. The will does not come within any of the authorities. There is no provision made for the event of either of the ladies dying.

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(1) (1791) 3 Bro. C. C. 215.
(2) (1902) 86 L. T. 496.
(3) [1916] 2 Ch. 50, 55.

Greenland for the Hospital Fund. There is no intestacy. The principle applicable was recently applied in *In re Browne's Will Trusts ; Landon* v. *Brown* (1): "From and after their decease" are proper words of remainder. The gift over of the capital as well as the income indicates that the Hospital Fund would have some income and there is no reason why it should be withheld. The Hospital Fund is entitled to the half share of the income.

Vernon. In *In re Browne's Will Trusts* (1) the words were "respective lives," and that is the real reason for the decision.

FARWELL J. The testator died on March 31, 1933, having made his will on March 11, 1930. The will has the merit of brevity, but raises a curious question of construction which is not free from difficulty. After appointing the Public Trustee his sole executor and trustee and providing for certain legacies the will continued : "All the rest residue and remainder of my estate of whatsoever nature or kind the same may be and wheresoever situate I give to my Trustee Upon trust to sell and convert all such parts thereof as do not already consist of money into money and invest the same in and upon such stocks funds and securities as are authorised for trust funds In trust to pay one-half of the nett income interest or dividends arising therefrom to my sister-in-law Rose Thornton Ragdale for her life and the remaining half of the nett income interest or dividends to my cousin Florence Tuffill for her life and from and after their decease to pay the principal as well as the income to King Edward the VII.'s Hospital Fund for London." The sister-in-law, Mrs. Ragdale, died in the lifetime of the testator so that the gift to her does not take effect. The estate is not a large one. The language of the will is capable of three possible constructions. First of all it is said on behalf of Florence Tuffill that in the events which have happened she is entitled to the whole of the income although in terms she gets only half thereof. I am asked to imply in the events which happened a gift to her of the whole. On behalf of the next of kin it is said that the gift over to the hospital does not take effect till the death of both ladies and that there is nothing in the will from which I can imply a gift of the half-share of income to the survivor, and there being no effective distribution of the half-share of the income it should go to the next of kin as on an intestacy. On behalf of the Hospital Fund it is said that each of the ladies is to take a half-share in the income and no more, and there is no implication to be drawn in favour of survivorship. I am asked to read the words " from and after their decease " as " from and after their respective decease," and to say that in the circumstances the half-share of the income goes at once to the Hospital Fund.

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(1) [1915] 1 Ch. 690.

It is not easy to ascertain from the language used in the will and in the events which have happened what course is the correct one to follow. I am not entitled to speculate on what the testator might have intended. I have to construe the will on the language used and ascertain the intention from that language. Taking the will as a whole I come to the conclusion that I ought to exclude that construction which will result in an intestacy unless the language necessarily leads to that result. I think I can find in the language of the will two possible alternatives: one in favour of the Hospital Fund to take immediately, the other that the survivor of the ladies takes the disputed half-share of the income for her life. On the one side if I prefer the Hospital Fund I have to read " after their decease " as " after their respective deaths " ; on the other I have to read into the will that which is not in the will. In my opinion, on the true interpretation of the will, the testator did not intend that the Hospital Fund should take till both ladies were dead, and so I cannot read "after their decease " as " after their respective decease." Looking to all the terms of the will I come to the conclusion that the Hospital Fund does not take until the death of Florence Tuffill and that Florence Tuffill is entitled to the disputed half-share of the income for her life, and I so declare.

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Solicitor for the Public Trustee : *Wm. Bird.*
Solicitors for the next of kin : *W. H. Mason & Son.*
Solicitors for the Hospital Fund : *Freshfields, Leese & Munns.*

R. A. Y.

FARWELL J.
1934
Jan. 22, 24.

In re POTTS.

Ex parte ETABLISSEMENTS CALLOT AND DE SCHRIJVER *v.* LEONARD TUBBS AND COMPANY AND THE OFFICIAL RECEIVER.

[No. 432 of 1933.]

Bankruptcy—Meeting of creditors—Composition—Proof tendered for voting—Proof admitted by Chairman—Decision not binding on chairman of any subsequent meeting—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 108, *sub-s.* 3; *Sch. I., rr.* 6, 7, 8, 9, 14.

Rule 14 of Sch. I. of the Bankruptcy Act, 1914, provides: "The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained":—

Held, that, on the construction of the rule, the decision of the chairman of the first meeting to admit or reject a proof for the purpose of voting is not binding, and that the chairman at each subsequent meeting has the power to admit or reject the proof.

MOTION.

This was a motion brought by the applicants, the petitioning creditors, against the respondents, Leonard Tubbs & Co. (the solicitors acting for the debtor throughout the bankruptcy proceedings), and the Official Receiver for an order that the decision of the Official Receiver in admitting Leonard Tubbs & Co.'s proof of debt for 389*l.* 19*s.* 8*d.* for the purposes of voting at the meeting of creditors held on November 29, 1933, be reversed.

The following facts are taken from the judgment:—

A receiving order was made against the debtor on the petition of the applicants on July 5, 1933. The bankruptcy petition was presented on April 25, 1933, the act of bankruptcy alleged and proved being that on February 17, 1933, the debtor had failed to comply with the bankruptcy notice. The debtor appealed against this order, but his appeal was dismissed and the receiving order therefore stood.

On August 9, 1933, the first meeting of creditors was held. The Official Receiver was the chairman of that meeting, and among the proofs lodged in time was the one in question in this motion. That proof was admitted for the purpose of voting at that meeting, the proof of the applicants being also admitted. On October 25, 1933, there was a second meeting of creditors, at which the debtor put forward proposals for composition by a payment of 5*s.* in the £. At that meeting the proof of the applicants and the proof of the respondents were admitted for voting. The proposal, not meeting with the approval of the majority at the meeting, was defeated. On November 29, 1933, a further meeting of creditors was held for the purpose of considering a further proposal put forward by the debtor for composition on payment of 5*s.* 3*d.* in the £. The applicants and the respondents were admitted for voting. On that occasion the proposal was accepted by the majority of the creditors present and the resolution was passed. The majority consisted of 22 creditors and the minority of 18, the money value of the majority being the sum of 88*l.* Among the creditors who objected to the composition and desired a bankruptcy were the applicants. At that meeting the applicants challenged the right of the respondents to vote, and they suggested that the respondents' proof had not been rightly admitted, the objection being that there was nothing to show that the debt that was said to be due had not been incurred after knowledge of the act of bankruptcy. Mr. Cohen, representing the applicants, desired to ask Mr. Gibbs, representing the respondents, whether that was so. The Official Receiver said that Mr. Cohen was at liberty to ask the question, but that Mr. Gibbs was under

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no obligation to answer. Mr. Cohen did ask the question, and Mr. Gibbs refused to answer. The Official Receiver decided that the proof ought to be admitted for the purpose of voting, but made a note to the effect that an objection had been taken. The meeting proceeded and the resolution was duly passed.

The debt in respect of which the proof was admitted by the Official Receiver was a bill of costs which was incurred by the debtor. The respondents were a firm of solicitors who had acted for the debtor for some time before any act of bankruptcy, and they were acting for him on January 9, 1933, that being the date on which he had called a meeting of creditors. They continued to act for him after that date, but his Lordship held, on the evidence before him, that the costs for which the proof was lodged did not include any costs incurred after January 9, 1933. At the Bar the respondents took the objection that the motion was out of time.

Sir Walter Greaves-Lord K.C. and *G. F. Kingham* for Leonard Tubbs & Co. Under r. 14 of Sch. I. of the Bankruptcy Act, 1914, a decision at the first meeting of creditors whether a proof is to be admitted or rejected is final. If the proof be admitted then it must be admitted at all subsequent meetings of creditors ; if it be rejected then it cannot be admitted at any subsequent meeting. It follows from that, that under s. 108, sub-s. 3, of the Bankruptcy Act, 1914, an appeal against the decision must be within twenty-one days of the first meeting. That being so this motion is out of time and must be dismissed.

[They referred to *Ex parte Ditton. In re Woods.* (1)]

W. N. Stable for the applicants. The language of r. 14 is quite clear. It says that the chairman of " a " meeting shall have power to admit or reject. If it had been intended that the decision of the first meeting was to be binding the rule would have said that the chairman of " the first " meeting.

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(1) (1880) 13 Ch. D. 318.

It was clearly intended that the chairman of each meeting should have the power to admit or reject a proof.

[He referred to *In re Van Laun. Ex parte Chatterton.* (1)]

FARWELL J. [stated the facts set out above, and continued :] The question arises in this way. Under the rules of the First Schedule to the Bankruptcy Act, 1914, the first meeting of creditors has to be summoned for a day not later than fourteen days after the date of the receiving order, unless the Court, for any special reason, deems it expedient that it should be summoned for a later day.

Rule 6 provides : " Meetings subsequent to the first meeting shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or if he has not proved, at the address given in the debtor's statement of affairs, or at such other address as may be known to the person summoning the meeting."

Rule 7 provides : " The official receiver, or some person nominated by him shall be the chairman at the first meeting. The chairman at subsequent meetings shall be such person as the meeting by resolution appoint." In practice, according to the evidence of the Official Receiver, the Official Receiver or the Assistant Official Receiver does in fact preside at all these meetings. It is not essential, but it is the practice.

Then r. 8 provides : " A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting."

Rule 9 provides : " A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained."

Then there is a provision with regard to secured creditors, and then comes r. 14, which is the important rule in this case. [His Lordship read r. 14, and continued :]

It is said on behalf of the respondents that that rule means that at the first meeting of creditors the question whether

(1) [1907] 2 K. B. 23.

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a particular proof is to be admitted for voting or not must be decided once and for all; that is to say, once there has been a decision by the chairman of the first meeting that a proof is to be admitted for the purpose of voting, that creditor is entitled in respect of that proof thereafter to vote at any other meeting, and the chairman of any subsequent meeting has no power to reject a proof which has already been admitted for voting at an earlier meeting.

The relevance of that contention is this: an appeal under the rule must be within twenty-one days of the decision. If the respondents are right in saying that the rejection or admission of a proof is to be made once and for all, since in this case the respondents' proof was admitted for the purpose of voting at the first meeting, namely, that on August 9, 1933, this motion is out of time.

On behalf of the applicants it is said that on the true construction of r. 14, the chairman at each meeting has power to determine whether a proof shall be admitted or rejected for the purpose of voting.

It has been suggested that if I adopt this latter construction many difficulties and inconveniences will arise, because it is said that the chairman of each meeting will have to review the decisions of the chairman of the earlier meetings. I doubt very much whether there is any substance in that suggestion. What in fact does happen, and will happen, if the applicants' contention is well founded, is that the chairman accepts prima facie the proofs which have already been admitted for the purpose of voting, but subject to this, that if an objection is taken that any particular proof ought not to be admitted at that meeting, then the chairman of that meeting must determine the question. On the other hand a decision against the contention of the applicants might have unfortunate results; because it is possible that at the first meeting a proof might be admitted for voting in respect of an alleged debt which before the second or any subsequent meeting was held, proved not to be a debt at all. In such a case if the respondents' contention be right, notwithstanding the fact that the particular person whose proof had been admitted on the first occasion was not a creditor at all, he would still be entitled to vote at all meetings of creditors.

It is not, however, a question of what is convenient, or what will lead to the most happy results that must determine this question. It is wholly a question of construction of r. 14, and reading the language of r. 14, I do not think that there is any real doubt but that the meaning of the rule is that the chairman of each meeting has the power to admit or reject a proof for the purpose of voting.

It is very material to see what the language of r. 14 is: "The chairman of *a* meeting shall have power to admit or reject a proof." It is not: "The chairman of *the* meeting," or "The chairman of *the first* meeting"; but it is "The chairman of *a* meeting"; and when the earlier rules are looked at, it will be found in the first rule what is spoken of is "the first meeting" and in the case of later rules there are the words "a meeting of the creditors." It is said that giving that construction to the rule, I am reading into it something which is not there. I do not accept that view. I cannot myself think that the language of the rule is really capable of any other meaning than that which I have put upon it. In my judgment, in those cases in which there is more than one meeting it is the duty of the chairman of the subsequent meetings to admit or reject proofs, but by that I am not suggesting that it is the duty of the chairman to review again in detail all the proofs that have been already admitted. If he thinks fit, he is entitled to say: "These proofs have been admitted; I am going to admit them again unless anybody takes objection." Then it is open to any person to take objection, and in that case the chairman must determine whether the objection is a good one or not. That the chairman has the power at each meeting to determine whether a particular proof is to be admitted or rejected, is, I think, plain on the language of the rule. That being so, the preliminary objection to this motion fails.

That brings me to the merits of this motion. At the meeting, the objection taken to the proof was that there was nothing to show that some portion of the debt had not been incurred after the act of bankruptcy came to the knowledge of the creditors, but at the Bar the objection was put on different grounds. Counsel for the applicants has argued that although the solicitors, the respondents, have put in a proof for this sum of 389*l.* 19*s.* 8*d.*, since they have not delivered a bill of costs to the Official Receiver, there is nothing to show that the amount claimed is in fact due to them; it is said that the bill is subject to taxation, and that on taxation a large part of the bill may be disallowed; and that consequently the Official Receiver ought not to admit, for the purpose of voting, a proof put in by a solicitor without at any rate having seen the bill of costs and satisfied himself that the bill is a proper one.

It is not without significance that under the rules it is provided that a proof intended to be used at the first meeting of creditors shall be lodged with the Official Receiver at a time not before 12 o'clock noon on the day but one before the meeting, or not later than 12 o'clock on the day before the day appointed for such meeting. The period allowed to the Official Receiver for determining whether a proof shall be admitted or rejected is not a long one, and clearly would make it impossible for him to obtain the taxation of a bill before the meeting if the bill had not already been taxed. Further, it is a little difficult to see how the Official Receiver is going to determine for himself, without taxation, whether a bill is one which should be reduced or not. I should be sorry, by any decision of mine, to throw such a burden upon an Official Receiver as would undoubtedly fall upon him if I were to come to the conclusion that for the purpose of determining whether a proof should be admitted for voting or not it is his duty to peruse a solicitor's bill of costs and to determine, prima facie, how far that bill of costs is one which ought to be paid in full or not. It must not be forgotten that a proof of this kind is a sworn document; it is sworn to by the creditor, and in this case it was sworn to by the solicitors. They swore to the amount of the debt that they claimed, and the debtor made no objection to the amount of the proof. On the evidence before me I can see no ground for thinking that the Official Receiver was wrong in admitting the proof. By that I do not want it to be thought that I am deciding that the Official Receiver should always, without regard to any other matter, admit the proof of a solicitor, without any bill of costs or any inquiry. It is a matter in each case for the Official Receiver to consider whether or not a proof should be admitted, but I am not going to say in this case that the Official Receiver has acted in any way wrongly because he has accepted the oath of the creditor, the solicitor, and has admitted the proof for the amount of the debt sworn to.

Then it is said, even if that be so, when an objection has been taken by some person to the proof, that the Official Receiver is bound, before determining whether the objection is properly taken or not, to insist upon having a bill of costs delivered, and possibly having that bill of costs taxed—which might involve very considerable delay. I cannot accede to that suggestion.

In my judgment, the true position is this. It is for the Official Receiver in the first instance to determine whether the proof should be admitted or rejected. If objection be taken to it, it is for him to determine whether that objection ought to be sustained or not. It is always open to the objector to come to the Court; but if the objector comes to the Court, his objection, in my judgment, should be supported by some evidence that the Official Receiver has come to a wrong conclusion in the matter. Here there is no evidence at all before me. The only ground upon which the objection was taken at the meeting was that there was nothing to show whether or not the bill contained items incurred after the act of bankruptcy had come to the knowledge of the solicitors. At the Bar it was said that a bill not having been delivered, there was no possibility of the Official Receiver coming to any definite conclusion on the matter, and that he therefore was bound to sustain the objection. Neither of those grounds in my judgment justify me in reversing the decision of the Official Receiver.

Reference was made to a decision *In re Van Laun. Ex parte Chatterton* (1), in support of the applicants' contention.

That was a decision that a trustee in bankruptcy is entitled, if he thinks it necessary, to have a bill of cost taxed. How that assists me in determining in this case whether or not the Official Receiver's decision ought to be reversed, I wholly fail to understand. In my judgment, I ought to assume that the Official Receiver has rightly acted in admitting or rejecting a proof, unless and until some reason based on some evidence convinces me that he has decided wrongly. In the present case there is no such evidence and I see no reason to suppose the Official Receiver has acted wrongly in the matter. It is not, in my judgment, the duty of the Official Receiver in every case, whether an objection is taken or not, before admitting that the proof of a solicitor for voting purposes, to insist on the delivery of a bill of costs. If he is satisfied that the case is one in which he ought to accept the oath of the solicitor, there is no reason why he should not do so, and unless it is shown that in so doing he has acted wrongly, that decision ought to stand.

Accordingly, the result of this motion is, that although on the preliminary objection the respondents fail, the applicant has taken nothing by his motion and it must be dismissed with costs.

There is one thing I want to make clear. In the remarks I have been making about the duty of the Official Receiver with regard to a bill of costs, I am making no possible reference to the duty of a trustee in bankruptcy after adjudication. That is an absolutely different matter. I do not want anything I have said to be supposed to refer to that in any way at all.

Solicitors for the applicant: *Cohen & Cohen.*

Solicitors for the respondent: *Leonard Tubbs & Co.*

(1) [1907] 2 K. B. 23.

P. J. B.

In re GOWER'S SETTLEMENT.

[1933. G. 1540.]

CLAUSON J.

1934

Jan. 15, 22

Infant—Maintenance—Settled Lands—Tenant in Tail in Remainder—Mortgage of Infant's interest to raise money for Maintenance—Power of Court to appoint person to convey Infant's interest, so as to give Mortgagee effective charge on fee simple—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 53—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 171.

In a case where an infant is tenant in tail in remainder of settled land with divers remainders over, the Court has power, by virtue of s. 53 of the Trustee Act, 1925, with a view to the application of the capital or income of the settled property for his maintenance, education or benefit, to authorize a mortgage of the settled land subject to interests having priority over the infant's tenancy in tail, so framed as to vest in the mortgagee a security which would be as effective a bar against the infant's issue and subsequent remaindermen as if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act, 1833.

SUMMONS for maintenance.

Under the will, dated September 21, 1899, of his grandfather Erasmus Gower who died in 1914, Erasmus Francis Gower, an infant, was tenant in tail in remainder expectant upon the life interest of his father, Captain Erasmus William Gower, of certain settled lands and capital moneys.

This was an application by the infant Erasmus Francis Gower asking that the respondents, the present trustees of the will of the testator, might be directed to raise by a mortgage of the interest of the infant in the lands and capital moneys subject to the settlement made by the will, certain sums for his maintenance, and that for that purpose they might be directed to execute such disentailing assurance as might be necessary.

J. M. Lightwood for the applicants. The Court has power under s. 53 of the Trustee Act, 1925 (1), to authorize a mortgage of the infant's interest in the settled property for the purpose of raising money for his maintenance and power to appoint a person to convey the property. It was decided in 1909 in *In re Hambrough's Estate* (1) that the Court had no jurisdiction to order a mortgage of an infant's estate tail in remainder for his maintenance and that therefore it was not an order directing a mortgage within the meaning of s. 30 of the Trustee Act, 1893: but now, under s. 53 of the Act of 1925, the Court is enabled to effect that object. The infant here is "beneficially entitled to property" within the meaning of s. 53, because by s. 68 of the Act, "property" includes any interest in any property real or personal. Sect. 53 is the same as s. 114 of the Law of Property Act, 1922, which never came into force and by which it was intended to confer the same powers upon the High Court as were afterwards conferred by s. 53 of the Act of 1925. That section is an amendment of s. 27 of the Trustee Act, 1893, and reproduces that section but more fully. By s. 50 of the Trustee Act, 1893, which reproduced s. 2 of the Trustee Act of 1850, the expression "convey" is defined as including the execution of every necessary or suitable assurance for conveying or otherwise disposing of land and included acts to be performed by tenants in tail in accordance with the Fines and Recoveries Act, 1833. By s. 33 of the Act of 1893, in all cases where a vesting order could be made, the High Court was empowered to appoint a person to "convey" and a conveyance in conformity with the order was to have the same effect as an order made under the appropriate provision. By an Act of 1830 (11 Geo. 4 and 1 Will. 4, c. 47), s. 11, where an estate was decreed to be sold for payment of the debts of a deceased person, an infant tenant in tail could be ordered to convey the land by a proper assurance in the law: and in *Radcliffe* v. *Eccles* (2) it was held that under s. 11 of that Act an infant tenant in tail could be ordered to disentail; and the same Act enabled the Court to compel the heir of the deceased to convey the land for the same purpose. In the case of an infant trustee, a vesting order under the Act of 1850 could

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(1) Sect. 53: "Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—

(*a*) appointing a person to convey such property; or

(*b*) in the case of stock, or a thing in action, vesting in any person the right, ..."

(1) [1909] 2 Ch. 620.

(2) (1836) 1 Keen, 130.

be made by the Court which had the effect of barring all estates in remainder: *Powell* v. *Matthews*. (1) It is submitted that now, under s. 53 of the Act of 1925, when an infant is beneficially entitled to property, the Court has power, for the purposes of the section, to appoint a person to convey the property for an estate in fee simple. True the word "convey" in s. 50 of the Trustee Act, 1893, included the performance of all formalities required by law for the validity of the conveyance and specially mentioned the acts to be performed by a tenant in tail in accordance with the Fines and Recoveries Act, 1833, while the definition of "convey" and "conveyance" by s. 68, (3), of the Act of 1925 does not expressly refer to acts to be performed by a tenant in tail, but that is because, enrolment having been abolished, the specific reference to tenants in tail became unnecessary.

By s. 53 and s. 68, (3), the estate tail (that is, the less estate) of the infant can be enlarged into an estate in fee simple; and the person appointed to convey can convey for the "whole estate," that is for an estate in fee simple: *In re Trevanion*. (2) The disentailing deed only gives effect to a right which belongs to the infant tenant in tail and which he could exercise by virtue of the interest which he took under the settlement, that is, a right to enlarge his estate tail: *In re Duncombe*. (3)

[Clauson J. referred to s. 171 of the Law of Property Act, 1925.]

By that section the Court is enabled to settle the property of a lunatic, and by sub-s. 2 can direct the receiver of the lunatic to execute a conveyance (including a disentailing assurance) and to do any other act or thing required to give effect to the settlement in the name and on behalf of the lunatic. Under that section the land can be conveyed: so, under s. 53 the Court can appoint a person to convey the land on behalf of the infant. The words "convey" and "conveyance" according to the definition section, s. 68, (3), are not restricted to a conveyance of the infant's

(1) (1855) 1 Jur. (N. S.) 973.

(2) [1910] 2 Ch. 538, 546.

(3) [1932] 1 Ch. 622, 632, 633.

estate tail, but the section enables the execution of a conveyance of an estate in fee simple which the infant, if of full age, could dispose of under the Fines and Recoveries Act. The infant is beneficially interested in property, and the person appointed by the Court under s. 53 to convey the property to which the infant is so entitled has power by virtue of that section and s. 68, (3), to execute such an assurance for disposing of the property, that is, the land, as will be suitable or necessary for the purpose of passing the fee simple estate therein : see per Farwell J. in *In re Gates.* (1)

Meyrick Beebee for the respondents, the trustees. Sect. 171 is confined to the case of a lunatic and has no application to the present case. What, within the language and intention of s. 53, the infant is beneficially entitled to is an estate in tail in remainder and that which the Court is empowered by s. 53 (as explained by the definition clause, s. 68) to appoint a person to convey is " such property," that is, not the whole estate in the land, but the infant's less estate or estate in tail in the land. Under s. 68, (11), " property " includes any estate and interest in real or personal property, and by (3) the term " convey " includes the execution of every necessary or suitable assurance for disposing of the infant's estate in the land, in the present case, his estate in tail in the land : the power to convey is so restricted.

Cur. adv. vult.

Jan. 22. CLAUSON J. By this summons the Court is asked to sanction the raising of certain moneys by a mortgage of the interest of an infant, Erasmus Francis Gower, in certain lands and capital moneys subject to a settlement. The interest of the infant is that of a tenant in tail subject to a preceding life interest.

When the matter came before my brother Bennett in Chambers, it was adjourned into Court in order that the bearing on the matter of s. 53 of the Trustee Act, 1925, might be considered. It is important that, if a mortgage is directed,

(1) [1930] 1 Ch. 199, 202.

there should be no doubt that the mortgagee will thereby obtain a security which will be a good charge, subject of course to the preceding life interest, upon the fee simple of the lands and upon the capital moneys without any chance of the charge being defeated, either by future issue of the infant inheritable under the entail or by any tenant in tail or in fee whose estate is to take effect after the determination or in defeasance of the infant's estate tail.

It will save verbiage and will tend to clearness, if I disregard the capital moneys and deal with the matter as though the settled lands only were in question. The question propounded to me can then be put in the simplest terms thus: A. B., an infant, being tenant in tail in remainder of Blackacre with divers remainders over: can the Court by virtue of s. 53 effectually authorize a mortgage of Blackacre (subject to the interests having priority over the infant's tenancy in tail) so framed as to vest in the mortgagee a security which will be as effective a bar against A. B.'s issue who take under the entail and subsequent remaindermen as if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act, 1833?

I assume, of course, that the mortgage is to be made with a view to the application of the capital or income of the property concerned for the maintenance education or benefit of the infant, as that is essential for the application of s. 53 to the matter in hand.

The difficulty arises in this way: if the infant had an absolute reversion in fee simple subject only to the preceding life interest, it would be plain that the Court could, under the section, appoint a person to assure the reversion, so as to give the mortgagee an effectual charge on the fee simple. The infant here, however, has not an absolute reversion; he has a tenancy in tail. Can the Court appoint a person to convey such interest in the fee simple as may be necessary to give the mortgagee the desired security? It is suggested that all the Court can authorize is a conveyance of "such property"; and the property (see the definition in s. 68, sub-s. 11, of the Act) is, it is suggested, the estate of the infant in the land in question, which is an estate less than the fee, being merely an estate tail. Further, it may be said, the expression "convey," see s. 68, sub-s. 3, includes the execution of every suitable assurance for disposing of the land for the infant's estate in the land or for any less estate: and, accordingly, unless the expression "convey" is given a scope wider than that which the definition states it is to include (which is of course perfectly possible; see the observations of Farwell J. in *In re Gates* (1)) the conveyance should, it is suggested, be restricted to a conveyance of the infant's estate and cannot extend to a conveyance of that of which the infant, if of full age, could by virtue of the Fines and Recoveries Act, 1833, s. 15, dispose, that is to say, the fee simple.

If the suggested construction be correct, it would seem that the section enables the Court merely to authorize such a conveyance as the infant, if of full age, could make of his estate tail, without utilizing the power of disposing of the fee simple under the power given by the Fines and Recoveries Act. The effect would be (see *Sturgis* v. *Morse* (2)) that the mortgage would cover only what is sometimes called a common law base fee, that is, a fee good during the infant's life, but determinable by the entry of the issue in tail. It seems absurd to suppose that the Legislature can have intended the section to be read so literally as to produce that result. If it is possible to construe the section so as to enable the Court to give a mortgagee a title not to such a very limited interest as that, but to such an interest as the infant, if of full age, could create under the Fines and Recoveries Act, 1833, that is, at the least, a statutory base fee, and with the proper consent, a fee simple, such a construction should obviously be adopted in preference to the alternative narrow and even absurd construction.

In my view, I am free to adopt the wider construction and to hold that the section authorizes the Court, in the case supposed, to appoint a person to convey Blackacre (subject to interests having priority over the estate tail) on the infant's behalf in as full and ample a manner as that in which the infant, by virtue of the Fines and Recoveries Act, 1833, could convey it, notwithstanding that the infant is, in a strict sense, not beneficially entitled to the fee simple interest so conveyed, but to an estate tail, being a less interest, that estate tail carrying with it, assuming the person entitled to be of full age, a statutory right to convey the larger interest.

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(1) [1930] 1 Ch. 199, 202.

(2) (1860) 2 D. F. & J. 223, 231.

I need not, however, speculate further on the Legislature's intentions nor need I stress what I understand to be the fact, that it has been commonly assumed, by many at least of those interested in such problems, that the very purpose of s. 53 was to get over the difficulty which emerged in *In re Hambrough's Estate* (1) in the way of the Court directing an effectual mortgage of the fee by disentailing an infant's tenancy in tail.

The following considerations seem to me to be an ample justification for placing the wider construction on the section :—

(i.) It was held as long ago as 1747 by Hardwicke L.C. in *Ex parte Johnson* (2) that where the Legislature authorized the Court to order an infant to convey lands, an infant tenant in tail could be ordered not only to convey such estate as was in him, but to suffer a common recovery and to assure the larger estate in fee simple ; and in 1836, Langdale M.R., after the Fines and Recoveries Act, 1833, held that in a similar case an infant should be ordered to convey by a proper assurance under that Act, with the result of vesting in the purchaser a larger estate than the infant himself had : *Radcliffe* v. *Eccles*. (3)

(ii.) In the year 1855, Wood V.-C. recognized in *Powell* v. *Matthews* (4) that under the terms of the Trustee Act, 1850, which for the purpose in hand correspond with the terms of the Trustee Act, 1893, a vesting order dealing with the estate of an infant tenant in tail operated to vest such estate as the infant could, if of full age, have conveyed under the Fines and Recoveries Act, 1833 and in *In re Montagu* (5) :

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(1) [1909] 2 Ch. 620.

(2) (1747) 3 Atk. 559.

(3) 1 Keen, 130.

(4) 1 Jur. (N. S.) 973.

(5) [1896] 1 Ch. 549.

it was held, in effect, that statutory provisions entitling the Court to appoint a person to convey the land to which an infant trustee is entitled, enable the Court, when the title of the infant trustee is a tenancy in tail, to appoint a person to convey the land not merely for the interest of the infant (whatever the effect of that might be) but for all such estate as the infant could convey under the Fines and Recoveries Act, 1833. It is not easy to see how any other conclusion could have been reached, since the definition of "convey" in s. 50 of the Trustee Act, 1893, corresponding with that in s. 2 of the Trustee Act, 1850, seems clearly to imply that, in the case of a tenant in tail, an assurance operating under the Fines and Recoveries Act, though its operation of course is to enlarge the estate, is properly described as a conveyance by the tenant in tail.

(iii.) In 1922, the Legislature enacted s. 114 of the Law of Property Act, 1922, in Part IV. of that Act. The section corresponds, in all but negligible differences, with the section which I have to construe. Part IV. is, by s. 127 of the Act, to be construed with the Trustee Act, 1893, and must therefore be read in the light of the definition of the word "convey" in s. 50 of that Act. It would seem to follow with reasonable clarity that since the Trustee Act, 1893, and the earlier Trustee Act had been construed so as to make a disentailing assurance or a vesting order, operating as a disentailing assurance, the proper method of dealing with an infant's tenancy in tail, when the infant was a trustee; so, on the enactment of s. 114, the conveyance therein contemplated of the infant's beneficial tenancy in tail must have been a conveyance by disentailing assurance, with the necessary effect of enlarging the estate conveyed into a fee simple which would, according to circumstances, be either a statutory base fee or an absolute fee simple.

(iv.) In 1925, the Act of 1922, which never in fact came into force, was, so far as s. 114 was concerned, replaced by the section which I have to construe. If I am to construe the latter section as having a narrower operation than s. 114 of the Act of 1922, I can do so only on the ground that the

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omission from the definition of conveyance in s. 68 of the Trustee Act, 1925, of the words "including the acts to be performed by tenants in tail in accordance with the provisions of the Act for the abolition of fines and recoveries" operates to cut down the meaning of the word "convey" in s. 53 of the Act of 1925 as compared with its meaning in the Act of 1922. But the omission of those words can be amply accounted for, first, by the fact that the words merely include explicitly in the preceding words something which is implicit in them, and, secondly, by the fact that the outstanding formality, namely, that of enrolment, is made obsolete by the 1925 legislation.

(v.) The language used in s. 171 of the contemporaneous Law of Property Act, 1925, shows quite clearly that the Legislature treats a power to settle a lunatic's estate tail as extending to a power to put into settlement the enlarged estate created by a disentailing deed, as appears from the words "including a disentailing assurance" in s. 171, sub-s. 2. I venture to think that this removes any vestige of difficulty there might otherwise be in treating a conveyance which operates to disentail, as anything but a proper conveyance of an estate tail within the meaning of the section which I have to construe.

Since the matter must go back to Chambers for the details to be settled, the order which I now make will be to refer the matter back to Chambers; but it will be prefaced by a statement that the judge is of opinion that the Court has jurisdiction, by virtue of s. 53 of the Trustee Act, 1925, with a view to the application of the capital or income of the lands and capital moneys whereof the infant applicant Erasmus Francis Gower is tenant in tail, to appoint a person to convey and assign the said lands and capital moneys (subject to all estates or interests therein having priority over the infant's interest) in as full and ample a manner as that in which the infant could, by virtue of the Fines and Recoveries Act, 1833, convey and assign the same, if he were of full age.

Solicitors: *Reid Sharman & Co.*

H. C. H.

EVE J.
1934
Jan. 22, 29;
March 27.

In re SOUTH EAST LANCASHIRE INSURANCE COMPANY, LIMITED.

[Nos. 00837 and 00844 of 1931.]

Company — Winding-up — Insurance Company — Motor Vehicle Insurance business—Provision against Third-party risks—Deposit by Company with Accountant-General—Proofs by holders of Motor Vehicle Policies—Priority — Security of Policy-holders as against General Creditors — Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, *sub-s.* 1, *s.* 3, *sub-s.* 2—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *Part II., ss.* 35, 36, 37, 42, 43.

In the winding-up of an insurance company carrying on motor vehicle insurance business, the deposit of 15,000*l.* made by the company with the Accountant-General of the Supreme Court under the Assurance Companies Act, 1909, as amended by s. 42 of the Road Traffic Act, 1930, is primarily liable to meet all claims of holders of motor vehicle insurance policies, and not merely claims in respect of third-party risks, and is not, except subject thereto, assets of the company available for distribution among its creditors generally. The right of proof is regulated by Sch. VI., para. (*c*), of the Assurance Companies Act, 1909, subject to the modifications imposed by s. 42, sub-s. 2 (*a*) and (*b*), of the Road Traffic Act, 1930.

SUMMONS IN WINDING-UP.

On a petition presented on December 31, 1931, an order was made for the compulsory winding-up of the South East Lancashire Insurance Company, Ld. (hereinafter called "the company"). The assets amounted to about 25,000*l.* but the liabilities were greatly in excess of that amount. The Official Receiver had been appointed provisional liquidator. The company carried on general insurance business and motor vehicle insurance business.

By the summons the liquidator asked the Court to determine (1.) whether the sum of 15,000*l.* deposited by the company under the Assurance Companies Act, 1909 (1), as amended by s. 42 of the Road Traffic Act, 1930 (1), formed part of the general assets of the company available for all its creditors, or whether the same was primarily applicable to the satisfaction of any and what claims under the motor

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(1) Assurance Companies Act, 1909, s. 3, sub-s. 1: "In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried

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to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund."

Sub-s. 2: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

(1) Road Traffic Act, 1930, Part II. Provision against Third Party Risks arising out of the use of Motor Vehicles.

Sect. 35, sub-s. 1: "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

. . . .

Sub-s. 4: "This section shall not apply to a vehicle owned by a local authority, a police authority, or the receiver for the Metropolitan Police District, or by a person who has deposited and keeps deposited with the Accountant-General of the Supreme Court . . . . the sum of fifteen thousand pounds, at any time when the vehicle is being driven by the owner or by a servant of the owner in the course of his employment, or is otherwise subject to the control of the owner."

Road Traffic Act, 1930, s. 36, sub-s. 1: "In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—

(*a*) is issued by a person who is an authorized insurer within the meaning of this Part of this Act; and

(*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road . . . .

. . . .

Sub-s. 3: For the purposes of this Part of this Act, the expression "authorized insurer" means an assurance company or an underwriter in whose case the requirements of the Assurance Companies Act, 1909, as amended by this Act, with respect to deposits by assurance companies and deposits and guarantees by underwriters are complied with.

Sub-s. 4: Notwithstanding anything in any enactment a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

vehicle insurance policies issued by the company; (2.) whether the right of proof by holders of motor vehicle insurance

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Sect. 42, sub-s. 1: "Section one of the Assurance Companies Act, 1909, shall have effect as if after paragraph (*e*) thereof there were added the following paragraph:—

(*f*) Motor vehicle insurance business, that is to say, the business of effecting contracts of insurance against loss of, or damage to or arising out of or in connection with the use of, motor vehicles, including third-party risks.

Sub-s. 2: Where an assurance company within the meaning of the Assurance Companies Act, 1909, carries on motor vehicle insurance business, that Act shall apply with respect to that business in the same way as it applies to accident insurance business subject to the following modifications:— . . . .

. . . .

(*b*) If the company also carries on assurance business of some other class, the reference in sub-section (4) of the said section two [of the Act] to a sum of twenty thousand pounds shall, as respects the motor vehicle insurance business, be construed as a reference to a sum of fifteen thousand pounds, and, notwithstanding anything in the said Act relieving a company from making a deposit in respect of any class of insurance business where it has made a deposit in respect of any other class of assurance business, the total sum to be deposited under the said sub-section (4) shall in no case be less than thirty-five thousand pounds."

Sect. 43, sub-s. 1: "No part of any sum deposited by any person with the Accountant-General of the Supreme Court under section thirty-five or section thirty-seven of this Act shall, so long as any liabilities, being such liabilities as are required to be covered by a policy of insurance under this Part of this Act, which have been incurred by him have not been discharged or otherwise provided for, be applicable in discharge of any other liabilities incurred by him."

Sub-s. 2: "Any rules made by the Board of Trade under section two of the Assurance Companies Act, 1909, which apply to deposits made by insurers carrying on motor vehicle insurance business shall, with such necessary modifications and adaptations as the Minister, after consultation with the Lord Chancellor, may prescribe, apply to deposits made with the said Accountant-General under the sections aforesaid."

Rules relating to Deposits made by Assurance Companies under s. 2 of the Assurance Companies Act, 1909, as amended by Rules made under the Road Traffic Act, 1930.

Rule 3. Where the assurance business by reason whereof the deposit is made is a class of business in respect of which a separate assurance fund is required to be kept (that is to say, is either life assurance business, employer's liability insurance business or bond investment business) then and n any such case, *and in the case of motor vehicle insurance business*, the application to the Board of Trade and the Warrant of the Board of Trade shall specify the particular class of business in respect of which the deposit is being made, and the deposit shall be marked accordingly in the books of the Paymaster-General to a special ledger credit. In all other respects the provisions of the last preceding rule shall apply to any such separate deposit.

policies in the liquidation of the company was regulated by Sch. VI., para. (*c*), of the Assurance Companies Act, 1909, on the footing that that paragraph was made applicable to motor vehicle insurance policies by s. 42 of the Road Traffic Act, 1930.

The summons originally came before the learned judge on November 4, 1932, when several points were argued, of which the above question only calls for a report. Judgment was delivered on November 10 to the same effect as in the present decision—namely, that the 15,000*l.* deposit was primarily applicable in the payment of all claims under motor vehicle insurance policies. An appeal was presented, and the Court of Appeal directed the case to be reheard on the ground that holders of motor vehicle insurance policies claiming in respect of third-party risks should have been, but were not, separately represented from holders of such policies claiming in respect of injury or damage to themselves. Further respondents having been added the summons was restored for argument.

C. W. Turner for the liquidator referred to the Assurance Companies Act, 1909, s. 3, sub-ss. 1 and 2, ss. 31 (*e*) and 32, and the Road Traffic Act, 1930, ss. 32, 35 and 37, and r. 3 of the Rules of October 8, 1930, applying rules made under the Assurance Companies Act, 1909, to motor vehicle insurance business, with modifications.

In the Court of Appeal Lord Hanworth M.R. said that the matter ought to be argued as between the different classes of motor vehicle policy holders, i.e. third-party risk policy holders, and general policy holders, insuring against risks to themselves or their cars as well as third-party risks.

L. W. Byrne for the respondent Margary, a general creditor in respect of rent.

The company was only engaged in fire and motor vehicle insurance business. The Assurance Companies Act, 1909, divides insurance business into six groups, to which another is added by the Road Traffic Act, 1930. Reading s. 32 of the Assurance Companies Act, 1909, with s. 42 of the Road Traffic Act, 1930, the effect is that a company which only carries on motor insurance business need only deposit 15,000*l.* in Court. If it carries on any other class of insurance business, it must deposit not less than 35,000*l.* In s. 32, paras. (*a*), (*b*) and (*c*) disappear, but para. (*d*) remains. The result is that a company is only bound to keep a single deposit in respect of fire or accident and motor vehicle insurance. There is no fund separately earmarked into which the premiums received must be paid in the case of motor vehicle insurance business, as there is in the case of life assurance business. The general fund is available for any class of creditor. See r. 7 of the Rules of 1910 made under the Act of 1909, with the addition of the words "other than motor vehicle insurance business made by the Rules made under the Act of 1930." And see *In re National Standard Life Assurance Corporation.* (1)

E. H. Blain for the respondent Phillips, an engineer, employed to inspect cars on behalf of the company.

The general scheme of the Assurance Companies Act, 1909, was to have a deposit of 20,000*l.* and a separate fund of which the deposit was to form part: see s. 2, sub-s. 4, and s. 3, sub-s. 2.

The difficulty which arises here is as to the difference between the claims on the deposit when there is a separate fund, and the claims on it when there is no such fund. The Road Traffic Act, 1930, repeals the exemption from deposit of motor vehicle insurance business, but it does not create any separate fund as required for life assurance business. In the case of a deposit made under s. 35, usually made by owners of large fleets of vehicles, then the Road Traffic Act succeeds in charging that deposit with claims arising out of motor vehicle insurance policies. Either the Legislature has failed to secure this 15,000*l.* to any particular class of creditors, or it has secured it to meet any claim arising out of motor vehicle insurance business, and not merely claims made under third-party risks.

H. S. G. Buckmaster for the respondent Sturge, an underwriter, supported the above arguments.

H. Glyn-Jones for the respondent Oman, claiming under a policy insuring against personal risks.

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(1) [1917] 1 Ch. 193, 196.

I submit that the previous judgment given was correct. The deposit is available to meet all claims under policies insuring persons against all motor risks, and not merely third-party risks. If every policy holder's claim had to be analysed in order to see how much of it was his own personal claim, and how much represented a third-party claim, the costs of the liquidation would be enormously increased. It was necessary to put in express words in the Road Traffic Act, 1930, to make it clear that all motor vehicle insurance policies must provide for the protection of third parties, but there is nothing in the Act to limit the deposit to the claims of any particular class, such as third parties. The purpose of the Act is to protect the policy holder, not any special class of claimant under a policy. Sect. 42 defines the nature of the insurance business to be added to the Act of 1909, and does not give any priority to third-party risks.

C. E. Harman for the respondent Midgley, a policy holder against whom a third party had recovered judgment in respect of an accident causing bodily injury.

The object of these provisions in the Road Traffic Act, 1930, was to secure that the victims of road accidents should be protected and compensated, and that is shown by the title of Part II. "Protection against third-party risks." But it is not every third-party risk, only certain of such risks, that are specially covered by the Act. Under s. 36, sub-s. 1 (*h*), such persons are to be insured against "death or bodily injury," not necessarily in respect of damage to their cars. The only sections that for this purpose need be considered are s. 43 of the Road Traffic Act, 1930, and s. 3, sub-s. 2, of the Assurance Companies Act, 1909. Sects. 35 and 37 do not involve the deposit by an insurer of any sum with the Accountant-General, but the reference in s. 43 to s. 35 is intended and should be read as a reference to s. 35, sub-s. 1. Therefore s. 43 applies to all three classes under the Act: the holder of a policy, the holder of a security, and the man who insures himself. The deposit becomes the separate fund available to meet statutory liabilities, and the only statutory liability is to insure against the claims of third parties. It may be said that s. 3, sub-s. 2, of the Act of 1909 does not apply as there is no separate fund created. But there is a deposit, and the fact that there is no separate fund to add to the deposit makes no difference; no part of the deposit is available for general creditors under s. 43 so long as any liabilities to policy holders remain unsatisfied.

Cur. adv. vult.

March 27. Eve J. Since this matter was before the Court of Appeal the summons has been amended by the addition as respondents of persons appointed to represent the various classes of creditors in whose absence the Court expressed an opinion that question 1 could not properly be disposed of. The question is whether the 15,000*l.* deposited by the company under the Assurance Companies Act, 1930, as amended by s. 42 of the Road Traffic Act, 1930, forms part of the general assets of the company available for all their creditors or whether the same is primarily applicable to the satisfaction of any, and what, claims under the motor vehicle insurance policies issued by the company. The arguments on behalf of the classes of creditors who have been added by amendment proceeded, as was to be expected, on the lines of that adopted by Mr. Byrne when appearing before me in the first instance and in the Court of Appeal on behalf of creditors whose claims arise otherwise than in respect of motor vehicle insurance policies. They were united in opposing Mr. Harman's claim on behalf of policy holders, who claim under their policies in respect of accidents occurring during the period covered by their policies but after the commencement of the winding-up. On the original hearing I made a declaration that the deposit is primarily applicable to the satisfaction of all claims under the motor vehicle insurance policies issued by the company, and the further arguments that I have heard confirm me in that conclusion.

It will be remembered that under Part II. of the Road Traffic Act, 1930, s. 35, insurance against third-party risks by persons using or causing or permitting any other person to use a motor vehicle on a road is compulsory and the policy or security must comply with the requirements of the Act (ss. 36 and 37), and by s. 42, sub-s. 1, s. 1 of the Assurance Companies Act, 1909, is to have effect as if after para. (*e*) thereof there were added a paragraph applying that Act to "motor vehicle insurance business, that is to say, the business of effecting contracts of insurance against loss of or damage to or arising out of or in connexion with the use of motor vehicles, including third-party risks." As the company in liquidation is an insurance company within the meaning of the Act of 1909 and carried on a motor vehicle insurance business, the 1909 Act applied with respect to that business in the same way as to accident insurance business, subject to certain modifications (see s. 42, sub-s. 2 (*b*), of the Road Act, 1930), of which the following is a summary: (1.) The reference in sub-s. 4 of s. 2 of the Act of 1909 to a sum of 20,000*l.* is, as respects the motor vehicle insurance business, to be construed as a reference to a sum of 15,000*l.*; (2.) ss. 5 and 6 and paras. (*a*), (*b*) and (*c*) of s. 32 of the Act of 1909 are not to apply. The result of these provisions and modifications is that a deposit is to be made in respect of the motor insurance business of the reduced amount of 15,000*l.*, that no actuarial report or abstract and no statement of the assurance business are required, but in lieu thereof an annual statement is to be prepared as provided in s. 32 (*a*), and—s. 32 (*d*)—that so much of the Act as requires an assurance company transacting more than one class of assurance business to keep separate funds into which all receipts in respect of each class of assurance business are to be paid shall not apply as respects motor insurance business.

This last modification introduces considerable difficulty, for it seems to deprive the insured motorist of the benefit of s. 3 of the Act of 1909. That section, so far as it is material, reads as follows: Sub-s. 1 is "in the case of an assurance company . . . . transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect . . . . of each class of business, shall be carried to and form a separate assurance fund with an appropriate name . . . ." Sub-s. 2 says: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable." In connection with this section it is necessary to refer to sub-s. 4 of s. 2, which provides—again reading only what is relevant to this case: "Where a company carries on . . . . assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund."

It would seem, therefore, to result from the joint operation of s. 3, s. 2, sub-s. 4, and s. 32 (*d*), that no separate assurance fund is contemplated for the motor vehicle insurances; and I have felt a difficulty in holding that the assurers can, in these circumstances, be brought within sub-s. 2 of s. 3 of the Act of 1909. Although the deposit would have been deemed to be part of the fund had a separate fund been created, there is in the Act nothing which says that the deposit is by itself to constitute a separate fund. I think the explanation is to be found in the presence in the Road Act, 1930, itself of s. 43, by which it is enacted that no part of any sum deposited by any person with the Accountant of the Supreme Court under s. 35 or 37 of that Act shall, so long as any liabilities, being such liabilities as are required to be covered by a policy of insurance under Part II. of the Act, which have been incurred by him have not been discharged or otherwise provided for, be applicable in discharge of any other liabilities incurred by him. Accordingly, I abide by the declaration that I have already made.

The costs of all parties must be taxed as between solicitor and client and paid out of the assets.

I may add that I see in what I have decided on these two statutes nothing which conflicts with the case of *In re National Standard Life Assurance Corporation* (1), decided by the late Neville J. It will be seen that the learned judge, in the second paragraph of his judgment, stated in terms that the liquidator having only asked for an order giving him a right to resort to the life assurance fund for the costs of the liquidation, so far as they have been incurred in respect of the life assurance business, had relieved him from considering the position as between the life assurance business and any other business which might exist. The question from which the learned judge was relieved is the one that I have endeavoured to solve. At page 198 he adds, alluding to the words to be found in s. 3, sub-s. 2, where it is enacted that the fund is not to be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable : " That is to say, as I understand it, that persons who have contracted with the company on a different basis from that of life assurance are not to be entitled to claim payment of their claims out of this fund, which is the security of the life policy holders.

There will be the same declaration as that which I made on the last occasion.

The costs of all parties will be paid out of the assets generally.

Solicitors : *Stanley & Co.*; *Tamplin, Joseph, Ponsonby, Ryde & Flux*; *William A. Crump & Son*; *Stanley & Co., for J. E. Dell & Loader, Brighton*; *J. P. Ayers.*

(1) [1917] 1 Ch. 193.

H. L. L.

LUXMOORE J.

1933
Dec. 14, 15, 19.
1934
Feb. 5, 6, 15.

In re HAWKSLEY'S SETTLEMENT.

BLACK *v.* TIDY.

[1933. H. 852.]

Will—Codicil—Second Will—Powers of Appointment under settlements—General and special—Purported revocation by second Will—Appointment of same persons as Executors and residuary legatees—"To carry out instructions that I may leave in writing . . . ."—Probate of all three testamentary dispositions—Opinion given by Probate Division on construction—Effect on a Court of construction—Doctrine of dependent relative revocation—Whether dispositions effectively carried out.

A testatrix having made a will in 1922 by which she purported to exercise certain general and special powers of appointment vested in her under certain settlements, subsequently in 1927 made a second will by which she appointed three named persons to be her executors and residuary legatees "to carry out instructions that I may leave in writing or verbally which I have not yet fully completed." This will contained a reference to a "cancelled will" which it was admitted referred to the 1922 will: the testatrix having written on a copy of it the word "cancelled." The 1927 will was described as "Last will and testament," etc.

By a decree of the Probate Court, these two wills together with a codicil were all admitted to probate. During the probate proceedings the President expressed an opinion with regard to the construction of these documents. In so doing he referred to matters which were inadmissible in a Court of construction on a question of construction. The order as drawn up did not contain any finding on the question of construction. Further having regard to the form of the order there was no opportunity of appealing from it in the case of some at least of the persons who would have been materially affected by the opinions expressed as to construction if those opinions were binding on them:—

Held, that having regard to the form of the order the Chancery Division was free to consider the question of construction and to treat the opinion expressed by the President as obiter:—

Held, also, that the description of the 1927 will as "the last will and testament" and the reference in it to the "cancelled will" were not by themselves sufficient to effect a complete revocation of the earlier will and codicil, but that if revocation of these two documents had to be found, it must be because the testatrix had disposed of the whole of her own property and that over which she had a testamentary power of appointment in a manner wholly inconsistent with the provisions of the two earlier documents.

As a matter of construction the will in 1927 rendered the whole of the provisions of the 1922 will and codicil ineffective because the provisions of the 1927 will were either inconsistent with those of the 1922 will and

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HAWKSLEY'S SETTLEMENT, *In re.* BLACK *v.* TIDY.

the codicil or were merely repetitions thereof. In so far as the provisions were repeated in the 1927 will, they took effect under that will:—

Held, further, that on the words used in the 1927 will—namely, "to carry out instructions that I may leave in writing or verbally which I have not yet fully completed," the residuary legatees took what was given them by the will as trustees, and it being impossible for the Court to ascertain what the trusts intended by the testatrix were, whatever passed to the residuary legatees had to be held by them on trust for the testatrix's next of kin:—

Held, further, that on the construction of the 1927 will the testatrix intended to treat the property subject to the general powers to be aggregated with her own estate and treated together with it as one mass.

In re Boyes. Boyes v. *Carritt* (1884) 26 Ch. D. 531, followed.

ORIGINATING SUMMONS.

This was a summons taken out by three persons, the first being one of the executors of the will of Mrs. Florence Hawksley Musgrave (hereinafter called the testatrix) and the other two being the present trustees of three settlements (hereinafter more specially referred to) and dated respectively in 1887, 1893 and 1910. The testatrix made a will dated September 3, 1922, a codicil dated March 24, 1925, and a second will dated June 10, 1927.

The material facts, some of which are taken from the judgment of the learned judge, are as follows:—

The testatrix, besides what I may term her own free property, had certain general and special powers of appointment in respect of trust funds of which she had the life interest. The general powers, so far as they are material to the consideration of this case, were conferred on the testatrix by two settlements, the one dated May 27, 1887 (this is referred to in the will of September 3, 1922, as "the settlement of 1887"), and the other is dated April 15, 1910 (this is referred to in the 1922 will as "the settlement of 1910"). The special powers were conferred by a settlement dated June 19, 1893 (this is referred to in the will as "the settlement of 1893"). The special powers are two in number; the first is a power to appoint, subject as therein mentioned, by deed or will, a life or lesser interest to her husband; the second is a power to appoint, in the events that happened, by deed or will, among the children and remoter issue of the testatrix's brother Charles Hawksley.

The gift over in default of appointment under the 1910 settlement is in favour of "the Chancellor Masters and Scholars of the University of Oxford to be applied for such purposes as Convocation of the University may determine."

The will dated September 3, 1922, consists of a number of separate clauses. In clause 2 the testatrix states her wishes with regard to the disposal of her body. By clause 3 she purports to exercise the general power conferred on her by the 1887 settlement. In effect the power is exercised for the benefit of two of the grandchildren of her brother Charles Hawksley—the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, children of her nephew Leonard Thomas Hawksley, in such manner that neither of the appointees is to take a vested interest unless he or she is living on February 28, 1942, and subject to this appointment, the funds subject to the 1887 settlement are to fall into and form part of the testatrix's residuary personal estate. By clause 4 the testatrix purports to exercise the special power conferred on her by the 1893 settlement in favour of her husband George Musgrave, by giving him a full life interest in the funds subject to the trusts thereof. By clause 5 she purports to exercise the special power conferred on her by the last mentioned settlement in favour of Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, who are both objects of the power, being grandchildren of the testatrix's brother Charles Hawksley. The trusts in their favour are declared by reference to those set out in clause 3 of the will, but in the event of the ultimate failure of those trusts, the funds subject to the 1893 settlement are given to their father Leonard Thomas Hawksley absolutely. By clause 6 the testatrix purports to exercise the general power conferred on her by the 1910 settlement in favour of the said Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley on trusts which again are declared by reference to those set out in clause 3 of the will; in the event of the failure of those trusts, the ultimate trust is in favour of the residuary legatees, and not in favour of Leonard Thomas Hawksley. By clause 7 she appoints as her executors and trustees her husband, and her nephew the defendant Leonard Thomas Hawksley and the defendant Henry Letheby Tidy. By clause 8 she gives a number of specific legacies. I need only refer to those given by paragraph (*d*) of the clause. By this paragraph she gives to her husband George Musgrave absolutely all furniture, plate, plated articles, linen, china, glass, musical instruments, books, pictures, prints, statuary, articles of vertu, and all other articles of personal, domestic or household use or ornament which the testatrix might have acquired during her and her husband's joint married life and which should be in or about or belonging to or appropriated for her leasehold house at 1, South Parks Road, Oxford, other than such articles as are the subject-matter of the specific gifts given in the preceding paragraph of clause 8. By paragraph (*e*) of clause 8 she gave the use and enjoyment of all such of the furniture and chattel premises described in the bequest in paragraph (*d*) of the same clause, but which she had not acquired during their married life, to her husband for life, and by paragraph (*f*), subject to this gift, she made an absolute gift of her musical instruments to a third party, and directed that all the remainder of the furniture and other chattel premises bequeathed by paragraph (*e*) should fall into and form part of her residuary personal estate. By clause 9 she gave a number of pecuniary legacies, including by sub-clause (*b*) a legacy of 100*l.* to each of her executors who should prove her will. By clause 10 she gave to her husband the use and enjoyment of her house, No. 1, South Parks Road, Oxford, for his life, on the terms therein mentioned, and by clause 11, subject to the life interest, she gave the said house to her nephew Leonard Thomas Hawksley absolutely. By clause 12 she devised and bequeathed all other property, real or personal, and of what nature or kind soever and wheresoever situate, or over which she might have any general power of appointment or disposition by will, and of which she might not otherwise dispose of by that her will or any codicil thereto, unto and to the use of her trustees, upon trust for sale and conversion with a power of postponement, and out of the money forming part of or arising from the sale and conversion of her said estate to pay her debts, funeral and testamentary expenses and legacies, and by clause 13 for investment in the usual manner, and she directed that the investments of the residue should be held upon trust to pay out of the annual income thereof certain annuities. The testatrix further directed that subject thereto the trustees should pay the income to her nephew Leonard Thomas Hawksley for his life, and after his death to Emma Marion Hawksley for her life, and subject thereto, she directed that the residuary estate should be held in trust in equal shares as tenants in common for the said Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley if both should be living on February 28, 1942, and if only one should be living at that date, then in trust for that one, and if neither should be living on that date, then in trust for Leonard Thomas Hawksley absolutely. No other provisions of the 1922 will are material to be mentioned.

The testatrix, by the codicil dated March 24, 1925, revoked the appointment of Leonard Thomas Hawksley as one of the executors and trustees of her will, and appointed the plaintiff Zoe Dobell Black to be an executor and trustee thereof in the place of Leonard Thomas Hawksley. The only other substantial alteration was that she gave her husband the first life interest in her residuary estate, subject to the annuities already mentioned.

The 1927 will, which is dated June 10, 1927, is described as : " Last will and testament of Florence Hawksley Musgrave," and continues in these terms : " I appoint my husband George Musgrave, Henry Letheby Tidy, M.D., and Mrs. Zoe Dobell Black, to be my executors and residuary legatees to carry out instructions that I may leave in writing or verbally which I have not yet fully completed. To my husband George Musgrave I leave everything for his life. To my great-nephew and niece Harry Stephen Ronald Hawksley, and Cicely Winifred Hawksley, such trust monies as I am compelled to leave back into the family (see cancelled will). To my dear friend Henry Letheby Tidy, my kind trustee and executor, grandfather clock and one thousand pounds. To Mrs. Zoe Dobell Black, my diamond and dark-blue enamel brooch. To the University of Oxford (see proper form) for the use of the Society of Women

Home Students, my house, 1, South Parks Road, Oxford, i.e., the Merton Coll. lease thereof, and such of the furniture as may be useful in the conditions of the purposes to which it is to be put and which is not otherwise appointed. My trustees can use their discretion. To Rev. Henry Gow, D.D. of Manchester College, Oxford, Mottled Mahogany Wardrobe in Yellow Room ; " and then there are gifts of certain chattels to members of the Hawksley family, and there is a clause that : " If anyone raises dispute or goes to law about my will, he or she is to have nothing " ; and : " My corpse to be disposed of as is easiest for the survivors—preferably by cremation."

The testatrix died on December 8, 1930. By a decree of the Probate, Divorce and Admiralty Division dated October 26, 1932 (1), all three testamentary dispositions above referred to were admitted to probate.

The testatrix's husband, George Musgrave, died on September 10, 1932, having by his will appointed the defendants Fanny Josephine Phelps, Edward Adams Parker and Charles Henry May executors, who duly proved the same. The testatrix's brother, Charles Hawksley, died on November 27, 1917, the defendant, Leonard Hawksley, was one of his sons, and the two infant defendants, Harry S. R. Hawksley and Cicely W. Hawksley were the children of Leonard Hawksley. The defendant Phyllis Bromage (married woman) was a daughter of Kenneth P. Hawksley, a son of the above mentioned Charles Hawksley and a nephew of the testatrix. K. P. Hawksley also died before the testatrix, namely on May 2, 1924. The defendant Thomas E. Hawksley was another son of K. P. Hawksley and a great-nephew of the testatrix, and the last defendant Alice Hawksley was a daughter of the above mentioned Charles Hawksley.

Difficulties having arisen on the construction of the above mentioned three testamentary dispositions of the testatrix and as to her exercise of the powers of appointment which she possessed under the three above mentioned settlements an originating summons was taken out as above stated.

The originating summons issued by the plaintiffs was in the

(1) See note (2) p. 405 post.

following form: It was intituled In the matter of (A) the trusts of a settlement dated May 27, 1887, and made between, etc.; (B) the trusts of a settlement dated June 19, 1893, and made between, etc.; (C) the trusts of a settlement dated April 15, 1910, and made between, etc., and (D) the estate of the [said] Florence Hawksley Musgrave deceased.

The questions for the determination of the Court were as follows, namely:—1. That it may be determined:

(*a*) Whether the powers of appointment given to the testatrix by the 1887 settlement and the 1910 settlement were effectually exercised by the 1922 will.

(*b*) Whether the power of appointment given to the testatrix by the 1893 settlement was effectually exercised by (i.) the 1922 will or (ii.) the 1927 will and in the latter event that the interest of the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley in the settled funds may be determined.

2. That it may be determined:

(*a*) Whether clause 8 (*d*) of the 1922 will operated to vest in the said George Musgrave absolutely the chattels therein specified or whether the bequest therein contained was to any and if so what extent revoked by the 1927 will and in that event that the interest of the University of Oxford in the said chattels may be determined.

(*b*) Whether by virtue of clause 8 (*f*) of the 1922 will the chattels therein described as "the remainder of the said furniture and other chattel premises bequeathed by paragraph 8 (*e*) hereof" forms part of the residuary personal estate of the testatrix or whether the bequest in such sub-paragraph contained was to any and if so to what extent revoked by the 1927 will and in that event that the interest of the University of Oxford in the said chattels may be determined.

3. That it may be determined:

(*a*) Whether the defendant Henry Letheby Tidy as one of the proving executors of the testatrix is entitled to the legacy of 1000*l.* given by the 1927 will in addition to the legacy of 100*l.* given to him by clause 9 (*b*) of the 1922 will or whether the said legacy of 1000*l.* is in substitution for the said legacy of 100*l.*

(*b*) If such legacy be cumulative whether interest thereon runs from December 22, 1932, being the date of probate or from December 8, 1931 (when twelve months from the date of the death of the testatrix expired).

4. That it may be determined whether by virtue of clause 11 of the 1922 will the defendant Leonard Thomas Hawksley is now absolutely entitled to certain leasehold property known as 1, South Parks Road, Oxford or whether the bequest therein contained was revoked by the 1927 will and in that event that the interest of Oxford University in the said property may be determined.

5. That it may be determined whether the residuary estate of the testatrix :

(*a*) was effectually disposed of by and falls to be dealt with under the 1922 will,

(*b*) passes under the 1927 will to the executors thereby appointed absolutely, or

(*c*) was undisposed of by the testatrix.

6. That if and so far as is necessary the trusts of the settlement may be executed and the estate administered by this Honourable Court.

The first defendant Henry Letheby Tidy was one of the executors of the three testamentary dispositions above referred to, and one of the present trustees of the three settlements above mentioned. He also claimed to be beneficially interested under the 1922 will and 1927 will.

Roger Turnbull for the plaintiffs.

F. R. Evershed K.C. and *G. R. Upjohn* for the first defendant H. L. Tidy. As a matter of construction it is submitted that the will of 1927 wholly revokes the 1922 will and the codicil. If that is so the second will gives the residue to the executors beneficially subject to their carrying out any instructions which the testatrix may have left. Regard must be had to the words " see cancelled will " and in addition as a matter of construction there are strong indications in the second will of an intention to cancel the earlier. No authority is really of any assistance.

Denis Browne for the second defendant Leonard T. Hawksley. He referred to *Briggs* v. *Penny* (1) and *Saltmarsh* v. *Barrett.* (2)

F. D. Morton K.C. and *A. Andrewes-Uthwatt* for the third and fourth defendants Harry S. R. Hawksley and Cicely W. Hawksley.

It is submitted that the 1927 will only revokes the 1922 will and the codicil so far as it contains effective dispositions which are inconsistent with the earlier documents. There is really no effective disposition of the residue by the last will. It is merely a gift to certain persons who are appointed executors and residuary legatees to carry out certain instructions: *Lemage* v. *Goodban* (3) and the remarks of Sir J. P. Wilde in that case. As to the construction of two inconsistent testamentary documents, see the principles followed by the Court in *Townsend* v. *Moore.* (4)

[They also referred to *In re Gates* (5) in the proceedings before the President of the Probate, Divorce and Admiralty Division and in the Chancery Division. (5)]

In the proceedings in this case before Lord Merrivale, the learned President in effect has determined questions 1 (*a*) and (*b*) of the originating summons in a particular manner.

On the question of dependent relative revocation, it is reasonably clear here that the executors do not take beneficially. See Jarman on Wills (7th ed.), vol. II., at p. 696: *Ellcock* v. *Mapp* (6) for the principle quoted by the Lord Chancellor at p. 508. See also *Vezey* v. *Jamson.* (7) On this question of inconsistent gifts in testamentary dispositions, see *Ward* v. *Van der Loeff.* (8) This case deals with the point raised by question 1 (*a*) of the summons and therefore question 5. With regard to question 1 (*b*), the learned President seems to have decided this. It is really a question of construction.

H. O. Danckwerts for the defendants Fanny J. Phelps, Edward A. Parker and Charles H. May, executors of the will of the testatrix's husband George Musgrave. It is submitted that these defendants get a life interest in the property subject to the special power: *In re Baker* (1); *In re Bund.* (2)

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(1) (1851) 3 Mac. & G. 546.

(2) (1861) 3 De G., F. & J. 279.

(3) (1865) L. R. 1 P. & M. 57, 62.

(4) [1905] P. 66, 79, 80, 86.

(5) [1928] P. 128. [1929] 2 Ch. 420.

(6) (1851) 3 H. L. C. 492, 508, 509.

(7) (1822) 1 S. & St. 69.

(8) [1924] A. C. 653, 659, 661, 665, 667, 671.

J. Norman Daynes K.C. and *C. Montgomery White* for the University of Oxford. The general power to appoint by will given by the 1887 settlement has not been effectively exercised. If the will made in 1927 revokes the 1922 will, does the former make an effective disposition of the residue. It is submitted not.

On the question of the effect of the views of the learned President when the three testamentary dispositions were admitted to probate, see the remarks on p. 385 in Williams on Executors (12th ed.), vol. I. See also on the effect of probate and the construction by a Court of construction on a testamentary paper so admitted, *Gawler* v. *Standerwick* (3); *Walsh* v. *Gladstone* (4); *Chichester* v. *Quatrefages* (5) for the remarks of Sir F. Jeune (quoting from an earlier case) regarding the determination of the construction of a will by a Court of Probate and the duty of a Court of construction. As regards intention see *In the Estate of A. F. Bryan.* (6) And as to constituting in the present case certain persons to be the testatrix's executors and residuary legatees, compare *In re Spooner's Trust* (7); *In re Vander Byl.* (8)

In *In re Thurston* (9) where a testatrix had exercised a general power of appointment and appointed an executor who was the sole trustee of the property, it was held on the construction of the will that the gift over in default of appointment took effect.

The 1922 will is displaced: look at the words in the 1927 will "see cancelled will."

T. K. Wigan for the three defendants Thomas E. Hawksley, Phyllis Bromage and Alice Hawksley. The general power is not exercised by the 1922 will because that will was revoked by the 1927 will, which is intended to make a complete disposition of the whole of the property of the testatrix: see *Henfrey* v. *Henfrey* (1); *Kent* v. *Kent.* (2)

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(1) [1929] 1 Ch. 668.
(2) [1929] 2 Ch. 455, 464.
(3) (1788) 2 Cox, 15, 19.
(4) (1842) 13 Sim. 261, affirmed (1843) 1 Ph. 290.
(5) [1895] P. 186, 188.
(6) [1907] P. 125, 128.
(7) (1851) 2 Sim. N. S. 129, 132.
(8) [1931] 1 Ch. 216, 221.
(9) (1886) 32 Ch. D. 508, 511.

The general power is exercised by the residuary gift in the 1927 will so that the property passes to the executors of that will. But as it is expressly given to them as trustees they cannot take beneficially. The principles in the case of *In re Boyes. Boyes* v. *Carritt* (3) should be followed. On the question of dependent relevant revocation, it is submitted that the principle to be derived from the cases is that if the first disposition is revoked only to give effect to a desire to benefit somebody else the revocation is dependent on that desire taking effect. But if there is an independent intention to revoke and it is only given to some one so that the gift may not be undisposed of, then if the second gift fails the revocation nevertheless stands. Here there is an example of the second branch: *Baker* v. *Story* (4) and *In re Bernard's Settlement* (5) for the remarks of Neville J. He also referred to *Ward* v. *Van der Loeff.* (6) On the question between the next of kin and the persons entitled in default of appointment, see *In re Vander Byl.* (7)

Cur. adv. vult.

1934. Feb. 15. LUXMOORE J. This summons raises a number of questions of construction arising under the testamentary dispositions of the late Mrs. Florence Hawksley Musgrave. Those dispositions are contained in three separate documents which have been admitted to probate under an order of the Probate Division pronounced by Lord Merrivale on October 26, 1932. The three documents admitted to probate are: (1.) a will dated September 3, 1922, which I will call "the 1922 will"; (2.) a codicil dated March 24, 1925; and (3.) a will dated June 10, 1927, which I will call "the 1927 will."

The 1922 will is a well-drawn document, obviously carefully

(1) (1842) 6 Jur. 355.
(2) [1902] P. 108.
(3) (1884) 26 Ch. D. 531.
(4) (1875) 23 W. R. 147.
(5) [1916] 1 Ch. 552, 560.
(6) [1924] A. C. 653, 661, 669.
(7) [1931] 1 Ch. 216.

prepared by a lawyer so as to exercise certain special and general powers of appointment vested in the testatrix. The codicil is also a lawyer's document. No question of construction arises under either of those documents, whether considered alone or together. The 1927 will was unfortunately not prepared by a lawyer, it was prepared by the testatrix herself. Read alone, the only substantial question which would arise under it is whether the executors are intended to take the residue beneficially, or are merely trustees of it for objects which, in the events that have happened, cannot be ascertained, with the result that the next of kin become entitled. Further difficulties, however, arise when the 1927 will is read in conjunction with the 1922 will and the codicil, the chief of these being with regard to the exercise of the special and general powers. The solution of these questions depends on the answer to the questions : did the 1927 will, on the true construction of all the documents, revoke the exercise by the 1922 will of all or any of these powers ? Has the 1922 will any operative effect as an exercise by the testatrix of any and which of the powers ? These are purely questions of construction.

Some difficulty is caused by the fact that in considering whether any, and which, of these three documents should be admitted to probate, the learned President addressed himself to some of the questions of construction and expressed a definite opinion with regard to them. The first question is whether that opinion is binding on me, and whether I ought, whatever my own opinion may be, to accept it as the expression of opinion of a Court of co-ordinate jurisdiction and follow it without further comment.

It is quite true that the Court of Probate has on many occasions to consider what is the construction of a document claimed to be testamentary before coming to a conclusion whether it should be admitted to probate or not ; but apart from this incidental consideration, it is no part of the duty of the Probate Court to sit as a Court of construction ; that duty devolves on the appropriate Court when it becomes necessary to consider the effect of whatever documents the

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Court of Probate has determined constitute the testamentary provisions of a particular testator or testatrix.

In considering questions of construction in relation to the question what are a particular testator's testamentary provisions, the Court of Probate in practice is entitled to consider, and rightly considers, many facts which are wholly inadmissible in a Court of construction when the only matter to be determined is, what is the meaning of a particular document or series of documents. The fact that the Court of Probate has admitted a document to probate as forming part of a testator's testamentary provisions has never prevented a Court of construction from coming to the conclusion that this document—after a consideration of the whole of the documents admitted to probate—has no operative effect. Many examples of such a result are to be found in the books.

In the present case the learned President has in his judgment expressed an opinion on construction of these particular documents. (1) In so doing, if he intended to bind the parties and any Court of construction subsequently called upon to construe the documents, he has gone further than was necessary, because the only purpose for which he had to consider these documents was to decide whether all or any and which of them should be admitted to probate. For this purpose all that was necessary for him to do was to satisfy himself whether any question of construction arose on the documents considered together. If the answer to this question was in the affirmative then it was his duty to admit all the documents to probate, leaving the ultimate solution of the questions of construction to the Court of construction. In expressing the opinion which he did as to construction, the learned President referred to matters which were obviously inadmissible in a Court of construction on a question of construction but which were equally clearly germane to the solution of the question what constituted the testatrix's testamentary dispositions. The order as drawn up does not contain any finding on the question of construction, and in my judgment the learned President, in expressing the opinion he did on construction, was doing so only with regard to the particular matter which he had to decide, and not with the intention of binding any Court before which the question of construction might ultimately come. It is to be observed that having regard to the form of the order of the Probate Division (1), there was no opportunity of appealing from it in the case of some at least of the persons who would be materially affected by the opinions expressed as to construction, if those opinions should be held to be binding on them.

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(1) Post, p. 402.

The conclusion which I have come to is that having regard to the form of the order of the Probate Court (1), I am free to consider the question of construction and to treat the opinion expressed by the President for this purpose as merely obiter.

What are the material facts in this case [His Lordship read a statement of the facts which with certain additions are set out above].

The question which I have to determine is whether there is on the true construction of these three documents, any part of either of the first two documents which remains unrevoked by the 1927 will. There is no clause in the latter document which expressly purports to revoke the earlier documents.

Mr. Upjohn, on behalf of the first defendant, and Mr. Norman Daynes on behalf of the University of Oxford, both argue that—apart from the inconsistent gifts contained in the 1927 will—there is in fact an expression of intention to revoke which as a matter of construction is to be found in the description of the document as the testatrix's last will and testament, and the reference contained in it to a document called a "cancelled will." It is admitted that the testatrix only made one will before she made the 1927 will—that is the 1922 will—and that she wrote on a copy of that will the word "cancelled," and the document referred to in the 1927 will as the "cancelled will" is the 1922 will. I do not think these words by themselves are sufficient to effect a complete revocation of the 1922 will and codicil; and that if revocation

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(1) Post, p. 405.

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of these two documents is to be found, it must be by reason of the fact that the testatrix has disposed of the whole of her own property and the property over which she had a testamentary power of disposition in a manner wholly inconsistent with the provisions of the two earlier documents. Of course, in considering the 1927 will from this point of view, the fact that it is described as "Last will and testament," and the fact that there is a reference to the 1922 will as a "cancelled will" must be taken into consideration. If the 1927 will is read alone, it is fairly plain that it would operate as a complete disposition of the whole of the testatrix's own estate and also of all property over which she had a general power of appointment. It is I think also fairly plain that it would operate as an exercise of the special power conferred on the testatrix by the 1893 settlement, to take effect immediately on the testatrix's death, in favour of the defendants Harold Stephen Ronald Hawksley and Cicely Winifred Hawksley. On this basis the provisions of the 1927 will are either entirely inconsistent with the provisions of the 1922 will and codicil, or repeat the provisions therein contained. I am consequently of opinion that, as a matter of construction, the 1927 will in fact renders the whole of the provisions of the 1922 will and codicil ineffective, because so far as any of them are repeated in the 1927 will, those provisions take effect under that will and not under the 1922 will and the codicil.

This does not, however, entirely dispose of the questions relative to the exercise by the testatrix of the general and special powers. With regard to the general powers it is said that although the 1927 will is in form a sufficient exercise of those powers, there is in fact no effective disposition of the property subject to those powers, because the exercise is in favour of persons who can only take as trustees and there are no trusts declared capable of ascertainment.

Three different results are claimed to flow from this position. First it is said on behalf of the University of Oxford that the funds subject to the general power go in default of appointment under the settlement creating the power. It is essential to the success of this argument that the appointment of the 1922 will was revoked by the 1927 will, and that although the 1927 will was sufficient to operate as an exercise of the general powers, the testatrix did not thereby indicate any intention of making the property the subject of the power her own for all purposes. Secondly, it is said on behalf of the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley that the doctrine of dependent relative revocation applies—namely, that the object of the revocation of the 1922 will by the 1927 will was to make a different disposition of the particular property; and that as that disposition failed, the disposition originally made by the 1922 will remains in force; and thirdly, it is said that the general powers were so exercised by the testatrix as to make the property subject thereto part of the testatrix's estate, with the result that in the absence of any effective trusts relating thereto, the property passes to the next of kin of the testatrix.

The first question to consider is whether on the true construction of the 1927 will the residuary legatees take a beneficial interest thereunder or are merely trustees. Prima facie the appointment of a person as residuary legatee connotes the intention to confer on that person a beneficial interest. If the gift had stopped at the appointment of residuary legatees, there would I think have been little room for doubt but that the intention was to give the residue to them for their own benefit. The words that follow are material—they appear to state the purpose of the gift. The words are: "to carry out instructions that I may leave in writing or verbally which I have not yet fully completed." If the testatrix had in fact communicated her wishes with regard to the disposal of her residue to the residuary legatees in her lifetime, there could be no question but that the residuary legatees would have been legally bound to carry them into execution. It seems to me that the prima facie meaning of the words used of necessity negatives any intention to confer a beneficial interest, and I think this view is supported and strengthened by the fact that specific legacies and a pecuniary legacy are given later in the will to two of the residuary

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legatees, and by the fact that the husband, who is named as one of the residuary legatees, is given a life interest in everything of which the testatrix is disposing. The decision in *In re Boyes. Boyes* v. *Carritt* (1) in my judgment covers this case, and I hold that the residuary legatees only take what is given them by the will as trustees. It is admittedly impossible for the Court to ascertain what are the trusts intended by the testatrix, and consequently whatever passed to the residuary legatees under the gift, is held by them on trust for the testatrix's next of kin.

The next question therefore that arises is whether the funds, the subject of the general powers of appointment, pass under the 1927 will or devolve as in default of appointment under the appropriate settlements. The answer to it depends on whether the testatrix has expressed any intention of making the property subject to the general powers her own for all purposes. It is plain from the 1927 will that the testatrix knew of the existence of the special and general powers—that is shown by the reference to the cancelled will, and to the direction that the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley are only to take that which the testatrix was "compelled to leave back to the family," namely, the property subject to the special power of appointment under the 1893 settlement—apart from this she leaves everything to her husband for life. This direction, coupled with under the 1893 settlement—apart from this she leaves everything to her husband for life. This direction, coupled with the appointment of executors and residuary legatees, is sufficient to satisfy me beyond any reasonable doubt that the testatrix intended the property subject to the general powers to be aggregated with her own estate and treated together with it as one mass.

The third question, therefore, arises: Does the doctrine of dependent relative revocation apply? The question in each case is whether the testatrix's intention was in any case to revoke the prior gift or appointment or only to revoke it for the purpose of carrying out the second gift or appointment. This question

(1) 26 Ch. D. 531.

is not determined by the presence or absence of express words of revocation: see *In re Bernard's Settlement* (1); *Ward* v. *Van der Loeff*. (2) If an absolute gift or appointment is made by one testamentary instrument to A., and the subject of the appointment is then given or appointed absolutely by a subsequent testamentary instrument to B., it is difficult to see how, if the second gift or appointment fails to take effect, it can be said that the first gift or appointment is operative. In such a case the second gift or appointment takes away that which was given or appointed in the first gift, and there is nothing in either instrument to show that the testator intended that A. was to take if B. could not take.

In the present case it is plain from the terms of the 1927 will that the testatrix when making it had determined that no member of the Hawksley family was to get any part of the property of which she was entitled to dispose, except that subject to the limited power in favour of the issue of her brother Charles Hawksley. In other words, the paramount intention of the 1927 will was to revoke the provisions of the 1922 will in favour of the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley for all purposes and to make an entirely fresh disposition in favour of other persons.

It remains to apply the general conclusions at which I have arrived to the particular questions raised by the originating summons. In answer to question 1 (*a*) I declare that the general power of appointment given to the testatrix by the 1887 and 1910 settlements respectively, were effectually exercised by the 1927 will. I answer question 1 (*b*) by saying that the special power of appointment given by the 1893 settlement was exercised by the 1927 will, and that the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley took an absolute interest in the funds subject to that settlement immediately on the testatrix's death, and that the testatrix's husband did not take a life interest in those funds. I answer questions 2 (*a*) and (*b*) by declaring that on the true construction of the testamentary documents, the testatrix's husband took a life interest only in the whole of the chattels referred to, and that, subject to such life interest, these chattels form part of the testatrix's residuary estate, subject, however, to the power of the trustees to determine in their absolute discretion whether any and which of the said chattels may be of use to the Society named, having regard to the purposes for which it may be determined to use the house No. 1, South Parks Road, Oxford. In answer to questions 3 (*a*) and (*b*), I declare that the defendant Henry Letheby Tidy is not entitled to the legacy of 100*l.* given to him by the 1922 will, but that the legacy of 1000*l.* given to him by the 1927 will is in substitution therefor. In answer to question 4, I declare that the defendant Leonard Thomas Hawksley takes no interest under the testatrix's testamentary dispositions in No. 1, South Parks Road, Oxford, but that this property is given to the Chancellor, Masters and Scholars of the University of Oxford to be used at their discretion for the Society of Women Home Students. In answer to questions 5 (*a*), (*b*) and (*c*), I declare that the testatrix's residuary estate falls to be dealt with under the provisions of the 1927 will, and that, in the events that have happened, is divisible among the next of kin of the testatrix. The costs of all parties, to be taxed as between solicitor and client, will be raised and paid out of the residuary estate.

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(1) [1916] 1 Ch. 552.

(2) [1924] A. C. 653.

Solicitors: *Bircham & Co.*; *May, May & Deacon*; *Field, Roscoe & Co., for Morrell, Peel & Gamlen, Oxford.*

A. R. T.

NOTE (1).

1932. Oct. 26. THE PRESIDENT: The question to be determined in this case is this: which among the testamentary papers found in the possession of the testatrix, Mrs. Florence Hawksley Musgrave, or of her solicitors on her behalf, at the time of her death, should be admitted to probate as constituting her last will. Mrs. Musgrave, who was a granddaughter of the well-known constructional engineer, Sir Thomas Hawksley, being a daughter of his son and successor Charles, died in September, 1930, at an advanced age. Under family settlements made at various times from 1871 to 1910, she had had for many years a secured income of her own of about 2000*l.* a year; and in addition apparently to some income arising from personal property under the various settlements, she had an absolute power of appointment over settled moneys amounting to between 9000*l.* and 10,000*l.* and a limited

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power of appointment over a fund of 10,084*l.* As to the larger part of the moneys in question, her power of appointment was limited to members of the Hawksley family. Under a settlement of April, 1910, covering a fund estimated at 8340*l.*, she had an absolute power of appointment and in default the capital would go to the University of Oxford to be dealt with as Convocation should determine. For several years before 1930, Mrs. Musgrave had been from time to time in bad health, and circumstances affecting some of those concerned in the reversion to her fortune or in her power of appointment had caused her a good deal of concern. She lived at Oxford with her husband and her solicitors were in London, and in the period in question, on various occasions she committed to writing statements of definite or provisional determinations as to these matters. In September, 1922, with the help of her solicitors, the testatrix made a comprehensive will dealing clearly with all the matters in question—the settled funds as well as her personal fortune—and in March, 1925, her solicitors prepared a codicil appointing a new executor and making some testamentary changes. The will and codicil are in being and their due execution is beyond doubt.

There is produced from among her papers a typed paper dated February 2, 1927—no doubt typed by her—containing directions to the executors under the will and codicil of 1922 and 1925, which, if they are of testamentary effect, give a leasehold house and furniture to the University of Oxford for specified purposes, and various gifts to St. John's College, Oxford, Nottingham Council Museum, and to sundry individual beneficiaries. The latter include a gift of a brooch (described by the testatrix) to her executrix, Mrs. Black, which I shall mention again. A claim is made in the suit on behalf of St. John's College by virtue of this document. On June 10, 1927, the testatrix executed a holograph will, which she herself had framed, and the same was duly witnessed. This is admitted by all the parties to be a valid testamentary act. Its terms are such as to illustrate the danger there is of failure when unskilled persons proceed to deal with a complex situation by making what is sometimes called a home-made will. This will of June 10, 1927, the testatrix placed in her repository—a bag which she kept by her at her home. She was very ill from time to time in 1928 and 1929, but kept in touch by correspondence with her solicitor, Mr. May. In September, 1929, she wrote to Mr. May a letter in which she referred to "the old cancelled will, and my emendations." She thought of sending on the papers, or papers so described, but did not. In February, 1930, she wrote of making "Final arrangements in my will, etc.," but added: "Owing to my husband's blindness and his and my ill-health, I can never leave home again." Nothing was done until later in 1930 when Mr. May was urgently sent for to Oxford owing to a new illness, and he then, with such knowledge as he could gain, drafted a codicil of a few sentences which would have put the testatrix's affairs in order. She did not however recover sufficiently to execute it, and upon her death it has become necessary to determine what testamentary documents of hers should be admitted to probate.

The case centres upon the will of June, 1927. The main controversy between the parties is whether that instrument revokes the will of 1922 and the codicil of 1925—one or both—or whether the will of 1922, the codicil of 1925, or the will of 1927 ought to be admitted to probate.

As to the typed paper dated "17.2.27," I need only say that there is no ground on the evidence before me on which it can be found to have any

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testamentary operation. It is not executed as a will. It purports to give directions to the testatrix's executors under the will of 1922 and the codicil of 1925, but, in view of the situation as to those instruments, it cannot be admitted to probate: see *Guardhouse* v. *Blackburn.* (1) The fact is not without interest that in the will of June, 1927, the testatrix gives effect to the intention as to a brooch which she mentions in the paper in question.

The plaintiffs propound the will of 1927 as the true last will of the testatrix, and as in terms excluding the earlier instruments. They point out that apparently on the day on which this will was executed the testatrix endorsed the copy of the will of 1922, which she then had, and which was found among her papers at her death, with the words "Cancelled, Florence H. Musgrave, 10th June, 1927." Three of the defendants claim probate of the will of 1922 and the codicil of 1925, together with the will of 1927. Two admit the will of 1927 as the only will in force, and raise questions whether it disposes of all the estate.

Whether the will of 1927 revoked the earlier acts is a question of the intention of the testatrix which prima facie is to be ascertained from her testamentary dispositions and the language in them. In various cases in this Division, as for example *In the Goods of Petchell* (2), before Sir J. Hannen, and *In the Goods of Harding* (3), the learned judge made it clear, that, whatever view may have been acted upon more or less consistently in earlier times, the words "last will" must not now be taken to prove revocation of earlier instruments. The document itself must be looked at. Here the words of prime importance are: "I appoint my husband, George Musgrave, Henry Tidy, and Mrs. Zoe Black to be executors and residuary legatees to carry out instructions that I may leave in writing or verbally which I have not yet fully completed." Having so dealt generally with her personal estate she proceeds to make specific bequests, so she included in her will a complete disposition of her own property apart from the settled funds. The operative effect of the bequest of the residue was not challenged in argument. That the testatrix was mistaken in thinking she could give effective instructions as to the residue otherwise than in accordance with the Wills Act, 1837, is immaterial. With regard to one parcel of settlements she made an effective appointment, none the less effective because she identified the subject-matter by reference to what she described as her cancelled will. "My cancelled will" was what she wrote on her copy of the will of 1922 and identifies it. No one suggests that this writing revoked the will. What is said is that it evidences her belief and intention. On the other hand, this must be remembered that a few days later the testatrix wrote to Mr. May in these terms: "Shall I send you the old cancelled will with my emendations? Most of it stands as before." In point of bulk the appointments made under the various settlements were a very outstanding part of the old will, cancelled or revoked as to everything of her own, as it was. "Most of it stands as before" seems entirely inconsistent with a belief that every disposition in the will had been abrogated. It might well describe voluminous clauses which dealt generally with the settled funds.

The 1927 will does not in terms revoke the earlier instruments. It disposes anew however of all the testatrix's own estate. Of the settled moneys—

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(1) (1866) L. R. 1 P. & M. 109.
(2) (1874) L. R. 3 P. & M. 153.
(3) (1872) 41 L. J. P. & M. 65.

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the destination of which was causing and thereafter caused her anxiety—she appointed anew only an identified part. To determine whether its revocation is effective, as some of the parties alleged, the situation must be considered as a whole. I do not adopt the expression "the Court leans against intestacy," which was cited from some cases in the course of the argument. The Court forms its conclusion on the actual facts. If there are however alternative views of the facts, both arguable, one resulting in a finding of intestacy and one in the establishment of a disputed will, the intention of the testator is in question and the Court will require to be satisfied that intestacy is made out. This case, however, does not fall within the class where such a course has to be followed. I am convinced, after full consideration of the facts, that the will of 1927 leaves intact the dispositions in the will of 1922 with which it does not expressly deal. Non-revocation and incorporation as regards the 1922 will stand much on the same footing. The words in the 1927 will, "see cancelled will," would of themselves necessitate some identification in the act of probate of the will of 1922. Cases like *Birkhead* v. *Bowdoin* (1), *In the Goods of the Countess Dowager of Limerick* (2), *Townsend* v. *Moore* (3) and *In the Goods of Jones* (4), show the means by which extraneous documents should, if need arises, be incorporated or identified in the act of probate.

Had the will of 1927 contained general words of revocation extending to the will of 1922, some means must have been found of identifying in the act of probate that part of the will which the testatrix incorporated in her appointment in favour of the children of Mr. Leonard Hawksley. As the matter stands, no such identification is required. The result of what I have said is that the three testamentary instruments in question, that of 1922, that of 1925, and that of 1927, must be declared to constitute the last will of the testatrix.

NOTE (2).

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION. (PROBATE.)

In the Estate of FLORENCE HAWKSLEY MUSGRAVE (DECEASED).

TIDY AND ANOTHER *v.* MUSGRAVE AND OTHERS.

THE PRESIDENT having taken the oral evidence of the plaintiff Black and of the witnesses produced on the plaintiffs' behalf and of the witnesses produced on the defendants' behalf and having heard counsel thereon on behalf of the plaintiffs, defendants and parties cited on October 26, 1932, pronounced for the force and validity of the last will and testament of FLORENCE HAWKSLEY MUSGRAVE, the deceased in this action as contained in the following scripts, the will dated September 3, 1922, the codicil dated March 24, 1925, and the will dated June 10, 1927, now remaining in this Court the first two mentioned documents being referred to in the affidavit of scripts of the defendants and marked "G" and "H" and propounded in this action on behalf of the parties and on further application of the counsel for the parties ordered that the costs of all parties as between solicitor and client be paid out of the estate and it is further ordered that the defendant George Musgrave having died since July 15 aforesaid this decree as regards his interest be effective as if made before his death.

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(1) (1842) 2 Notes of Cases, 66.

(2) (1850) 2 Rob. Ecc. 313.

(3) [1905] P. 66.

(4) (1920) 123 L. T. 202.

October 26, 1932. Registrar.

MAUGHAM J.
1933
Dec. 6.

In re BENI-FELKAI MINING COMPANY, LIMITED.

[No. 00128 of 1933.]

Company—Winding up—Voluntary Liquidation—Assets insufficient to discharge liabilities—Income Tax—Remuneration of Liquidator—Priority—Right of Liquidator to retain remuneration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7. *c.* 69), *ss.* 171, 196—*Companies (Winding up) Rules.* 1909, *r.* 187, *para.* 1.

A company incorporated in 1907 owned and worked mines and transport facilities in Algeria under concessions from the French Government. In December, 1925, the Court sanctioned a scheme for the transfer to two French companies of the whole of the company's undertaking and assets, except cash and assets sufficient to repay the company's preference share capital, and a resolution for voluntary liquidation was passed. The company's manager was appointed liquidator at a salary of 1000*l.* a year and its creditors were told that the liquidation was purely formal and they would be paid in full. The assets excepted from the undertakings to be acquired by the French companies were not enough to repay the whole of the company's preference share capital and, under a provision in the scheme, payments on account amounting altogether to five shillings in the pound were made to preference shareholders in 1925 and 1926. Owing to various difficulties created by causes which included the general strike of 1926, the scheme could be carried out only by allowing the French companies to work the mines and transport facilities by means of moneys which the company provided by realizing the ores. The amount of the disbursements which the company had to make exceeded that produced by realizing the ores, and from June, 1928, the liquidator could preserve the assets only by borrowing and by means of an overdraft granted by the company's bank. In 1929 an assessment under Schedule D of the Income Tax Act, 1918, was made on the company for the year 1929–1930; in March, 1930, an assessment was made on it for the year 1926–1927; and in October, 1930, another assessment was made on it for the year 1929–1930. None of the amounts due under those assessments were paid. Before the liquidator had received the notice of the last assessment the company's mine had been closed down, and before the date of this summons the French companies had gone into liquidation and the French liquidator on their behalf claimed and took possession of the assets in Algeria out of which the amounts due under the assessments could otherwise have been paid. Included in the disbursements made by the company were sums which the liquidator had retained as remuneration and on account of travelling expenses. The liquidator stated in an affidavit that he had received no remuneration since 1931, that he had had no funds in hand since June, 1928, and that he had since April, 1931, spent all his assets to maintain himself and was practically destitute at the date of this summons:—

Held, (i.) that income tax to which a company has been assessed in respect of profits earned after the commencement of the winding up is not within the words ". . . . fees and actual expenses incurred in realising or getting in the assets . . . ." in r. 187, para. 1, of the Companies (Winding up) Rules, 1909, but that that income tax is part of the expenses of the winding up;

(ii.) that, when the assets of a company in voluntary liquidation are insufficient to discharge its liabilities, the Court has power, under ss. 171 and 196 of the Companies (Consolidation) Act, 1908 (now ss. 213 and 254 of the Companies Act, 1929), to make an order, in the exercise of its discretion, as to the payment thereout of the "costs, charges, and expensse" (including the liquidator's remuneration) in such order of priority as it thinks just, and that prima facie all the expenses ought to be paid before the liquidator's remuneration;

Semble, the Court in a proper case may authorize a liquidator to keep remuneration which he retained when he had no reason to believe that the company's assets would not be sufficient to discharge all costs, charges and expenses of the liquidation;

(iii.) that in the present case the liquidator should be authorized to retain the remuneration received by him before the date of the notice of the assessment of October, 1930.

SUMMONS in a winding up.

This summons raised the question whether the remuneration of a liquidator was payable in priority to income tax to which the company had been assessed since the commencement of the liquidation.

Beni-Felkai Mining Co., Ld. (hereinafter called "the company") was incorporated in 1907 to acquire and work mines in North Africa. Its capital was 120,000*l.*, divided into 60,000 preference shares of 1*l.* each, 35,000 "A" ordinary shares of 1*l.* each and 25,000*l.* "B" ordinary shares of 1*l.* each. At the date of this summons all the ordinary shares and 56,507 of the preference shares had been issued and fully paid. Under concessions from the French Government the company owned and worked mines and railways and other transport facilities in Algeria, where the mining and transport operations of the company's business were carried out.

In 1925, fluctuations in French currency caused loss in exchange to the shareholders in England. It was decided to transfer the business to two French companies to be formed to acquire it, one (hereinafter called "the mining company") to acquire and work the mining concessions and undertaking subject to the liabilities existing in relation to them and the other (hereinafter called "the transport company") to acquire the railway, transport and shipping concessions and assets of that part of the business subject to its liabilities. The consideration for the transfer to the mining company was to be satisfied by shares of that company, and that for the sale to the transport company by shares of that company. It was proposed that there should be excepted from the undertakings to be acquired by the mining company and the transport company, cash and other assets to produce on realization enough cash to repay the company's preference share capital then outstanding with interest to the date of repayment. Those decisions and proposals were incorporated in a scheme of arrangement between the company and its shareholders intended to become operative on the execution of agreements for sale between the company and the mining and transport companies and the passing and confirmation by the company of a special resolution for winding up. The scheme, approved by the shareholders, was sanctioned by the Court on December 15, 1925, and by a special resolution passed and confirmed on December 30, 1925, it was resolved that the company should be wound up voluntarily. The respondent to this summons, who had for many years acted as manager of the company at a remuneration rising from 750*l.* a year to 1000*l.* a year, consented to act as, and was appointed, liquidator at a remuneration of 1000*l.* a year. The company's creditors were informed that the liquidation was purely formal and that they would be paid in full.

The mining company was incorporated under the name "Société Minière de Beni Felkai" and the transport company under that of "Société de Transports d'Agriani." Each company executed an effective agreement with the company to adopt the scheme of arrangement and to take a transfer of the assets to be acquired by it in accordance with the scheme. Later application was made to the French Government for the transfer into the names of the mining company and the transport company of the concessions, authorities and schemes vested in the company and to be transferred to the mining company and the transport company under the terms of the scheme.

The assets excepted from the undertakings to be acquired by the mining company and the transport company were not enough to repay the whole of the company's preference share capital. Therefore,. pursuant to a provision in the scheme, payments were made to the preference shareholders, on account of sums due to them, by instalments, as follows: 2*s*. in the pound on December 31, 1925, and March 9, 1926, and 1*s*. in the pound on July 2, 1926.

Various difficulties, created by causes which included the general strike of 1926, made it impossible for the scheme to be carried out save by allowing the mining company and the transport company to work the mines, railways and other transport facilities by means of moneys provided by the company through realization of the ores. The realizations produced an aggregate of 170,239*l*. 8*s*. Disbursements had to be made to the amount of 171,125*l*. 11*s*. 4*d*. From June, 1928, the liquidator was able to preserve the company's assets only by borrowing and by loans granted to him by the company's bankers on overdraft.

On October 8, 1929, an assessment was made on the company under Schedule D of the Income Tax Act, 1918, of 20*l*. in respect of the sum of 100*l*. for the year 1929–1930, and notice of the assessment was issued to the liquidator on October 24, 1929; on March 28, 1930, an assessment was made on the company under that schedule of 58*l*. 12*s*. in respect of the sum of 293*l*. for the year 1926–1927, and notice of the assessment was issued to the liquidator on May 2, 1930; and on October 14, 1930, an assessment was made on the company under that schedule of 487*l.* 16*s.* in respect of the sum of 2439*l.* for the year 1929–1930, and notice of that assessment was issued to the liquidator on December 8, 1930.

The liquidator tried to sell the company's mining concessions and other assets in Algeria but could not do so. Before he received the notice of the assessment of October 14, 1930, the Beni-Felkai Mine, which was the company's property, had been closed down, and the workmen paid off, and only the bare minimum staff was kept, to protect the property and for the realization of the assets. Before the date of this summons the mining company and the transport company went into liquidation, and the French liquidator took possession of the assets in Algeria, claiming to be entitled, on behalf of those companies, to those assets, which otherwise would have been available to pay the income tax to which the company had been assessed. To April, 1931, the liquidator retained as remuneration, since his appointment as liquidator, sums of 82*l.* 6*s.* 8*d.* a month. These sums were included in the disbursements of 171,125*l.* 11*s.* 4*d.*, as also were sums for travelling expenses amounting, between December 7, 1925, and December 31, 1930, to more than 1000*l.* and sums amounting, during that time, to more than 400*l.* and entered in the statement of accounts filed by the liquidator as "Thos. Cook & Son, Travelling Expenses." The liquidator stated in an affidavit that he had received no remuneration since 1931 save 8*l.* in July and 10*l.* in December of that year, that he had had no funds in hand since June, 1928, that he had explained to the Commissioners of Inland Revenue that he had no moneys available to pay the tax to which the company had been assessed, that he had realized and spent the whole of his personal assets in his efforts to maintain himself since April, 1931, and was at the date of this summons practically destitute, and that he had desired to resign his appointment as liquidator, but had been unable to induce anyone to accept the position in his place or relieve him of the responsibility of it. At the date of this summons, there was a balance of more than 890*l.* due to the company's bankers on overdraft. An affidavit by an assistant solicitor of Inland

Revenue stated that the final assessment for the income tax year 1929–1930 was based on the profits for 1928, and that the approximate amount of those profits must have been known to the liquidator a year before July, 1930, when the company's business came to an end. It was contended, also, that the liquidator still had in his hands a sum of 5285*l.* 5*s.* 10*d.*, which was the total of the monthly sums of 82*l.* 6*s.* 8*d.*, and which he claimed to retain as remuneration: and this summons, which was issued at the suit of His Majesty's Attorney-General on behalf of His Majesty, asked, inter alia, that the liquidator might be ordered, out of the company's moneys which he claimed to retain as remuneration, to refund to the company the amounts of 58*l.* 12*s.*, 20*l.*, and 487*l.* 16*s.*, income tax, to which the company had been assessed, any other claims of the company that might be payable pari passu therewith, and the costs of this application, and that out of the moneys refunded those three sums might be paid to the Commissioners of Inland Revenue and the Attorney-General's costs be paid.

J. H. Stamp for the Attorney-General. This is an application by the Attorney-General in an endeavour to recover income tax assessed upon the company while in liquidation. The short point on the summons is whether the liquidator is entitled to retain the remuneration, which he claims by his accounts to have retained, in priority to the Crown, and whether, if he is not entitled to retain the full amount, the bank and the Crown will come in pari passu. The question will arise in what order the sum claimed as remuneration will be payable, if it is payable at all. In this case the Crown desires to establish its right to be paid income tax at least pari passu with other creditors and, in so far as there are payments of remuneration outstanding, in priority to those payments. Income tax incurred in the course of a company's liquidation is one of the expenses of the liquidation. It is quite clear that a liability incurred after the commencement of liquidation cannot possibly be the subject of preference. Therefore, unless it is an expense of the liquidation, it has no locus standi at all. It is not a claim against the liquidator who, so far as his status goes, is merely a substitute for the directors. The liability is the company's, not his: *In re Trueman's Estate* (1); *In re Wearmouth Crown Glass Co.* (2) A fortiori, income tax the liability to which is incurred after the commencement of a winding-up cannot possibly be a liability of the company provable in the liquidation. It must be part of the costs of the liquidation, and must fall within the rule that the costs of liquidation must be provided for. The relevant statutory provision is s. 196 of the Companies (Consolidation) Act, 1908 (3), which is identical with s. 254 of the Companies Act, 1929. The remuneration of a liquidator has been the subject of consideration by Lord Romilly M.R., in *In re Massey* (4), and by the Court of Appeal in *In re Sanitary Burial Association.* (5) The Crown's right to income tax is no less worthy than the rights of other creditors to whom liabilities have been incurred on the company's part during the winding up, and that right ought, as a proper expense of the liquidation, to be given priority over the liquidator's remuneration.

H. F. F. Greenland for the liquidator. It is quite clear that, unless income tax can be brought within the words "All costs, charges, and expenses properly incurred in the voluntary winding up of a company. . . .", the liquidator's remuneration has priority over the Crown's claim for income tax. Sect. 209 of the Companies (Consolidation) Act, 1908, is the only section in the Act referring to "assessed taxes." A distinction is drawn between "assessed taxes" and "expenses of the winding up." The distinction is between "income tax," which is called a "debt" and "costs and expenses of the winding up." (6) See also rule 187 of the Companies (Winding

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(1) (1872) L. R. 14 Eq. 278.

(2) (1882) 19 Ch. D. 640.

(3) "All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

(4) (1870) L. R. 9 Eq. 367.

(5) [1900] 2 Ch. 289.

(6) Sect. 209, sub-s. 1, (*a*): "In a winding up there shall be paid in priority to all other debts—

(*a*) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and up) Rules 1909, para 1. (1) The payment of income tax does not in any way assist in getting in or realizing the company's assets. It is a tax imposed on any profit which may have arisen after the assets have been got in. Nor is it a payment of the nature of a "necessary disbursement" by the liquidator. Payments of that nature are those which he has made in the course of his duty, e.g., for postage stamps and telephone calls, and they are not a liability of the company. On that analogy a liquidator's remuneration is clearly payable in priority both to income tax and to moneys

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payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment."

Sub-s. 3. "Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them."

Sub-s. 5. "The date hereinbefore in this section referred to is—

(*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(*b*) in any other case, the date of the commencement of the winding up."

(1) Rule 187, para. (1): "The assets of a Company in a winding up by the Court, remaining after the payment of the fees and actual expenses incurred in realising or getting in the assets, shall, subject to any order of the Court, ... be liable to the following payments, which shall be made in the following order of priority, namely :—

First.—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court.

Next.—The remuneration of the special manager (if any).

Next.—The costs and expenses of any person who makes or concurs in making, the Company's statement of affairs.

Next.—The taxed charges of any shorthand writer appointed to take an examination. Provided that where the shorthand writer is appointed at the instance of the Official Receiver the cost of the shorthand note shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the Company.

Next.—The Liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for.

Next.—The costs of any person properly employed by the Liquidator.

Next.—The remuneration of the Liquidator.

Next.—The actual out-of-pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of Trade."

borrowed in the course of a liquidation. Rates are on an entirely different footing. The liquidator, in order to carry on the business, necessarily uses some one else's property, and it is inequitable that he should use it without paying for it. There is, however, no analogy between that payment and the payment of income tax, which necessarily takes away part of the company's profits. Such an analogy would be entirely misleading. The rule thus clearly states that the liquidator's remuneration is to take priority: see *In re A. Boynton, Ld.* (1), which dealt with the case of a receiver. With regard to s. 171 of the Companies (Consolidation) Act, 1908 (2), it is true that the Court should determine priorities, but income tax is not part of "costs, charges, and expenses" within s. 196: it is a debt and liability of the company. In *In re National Arms and Ammunition Co.* (3) the Court of Appeal held that rates should be paid and relied, not on any provision of company law, but on the general principle that if a man uses another man's property he must pay for that use: see also *In re International Marine Hydropathic Co.* (4)

[MAUGHAM J. What I cannot logically see is why the Court has power to hold that it is fair enough that the liquidator's remuneration should be paid, and paid in full, on the ground that it is a reasonable expense in the liquidation.]

The Court derives that power from the principle that the company, which takes the benefit of the liquidator's services, must bear the burden of his being paid for them.

[MAUGHAM J. No: the Court is dealing, not with equities, but simply with statutes and rules. A liquidation is not necessarily fair.]

J. H. Stamp in reply. With regard to the construction of s. 196, there can be no doubt that the expense incurred in earning profits is an expense incurred in either getting in or realizing assets: if, in so doing, a liability to income tax is incurred, income tax is a necessary consequence of earning profits and is one of the "costs, charges, and expenses" covered by the section. If it is not that it is a necessary disbursement within para. 1 of r. 187 of the Companies (Winding up) Rules, 1909. In fact, the liability for income tax is really to be found provided for by the words "actual expenses" in the first sentence of that paragraph. When a voluntary winding up is being dealt with and s. 196 is being applied, the payment of taxes is part of the carrying on of the undertaking of the company. In the present case there is no analogy with cases dealing with advances made by banks and others to receivers in which a charge in favour of debenture holders is being realized. There the Court has to consider what is the true bargain as between the lender and the receiver or the Court, and the lender comes into the action as a going action. The receiver is an officer of the Court and the Court will see that his remuneration is paid. The winding up in the present case is, however, quite different. The liquidator is his own master. He is not an officer of the Court, but a paid officer the priority of whose payment is regulated by the Act. The real question here is whether the Crown should risk losing income tax or the liquidator should risk losing his remuneration. On the whole the general rule is well established that in such a case the Crown should not take the risk, and, in the present case, no sufficient grounds have been established for waiving the rule.

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(1) [1910] 1 Ch. 519, 525.

(2) Sect. 171: "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the court thinks just."

(3) (1885) 28 Ch. D. 474.

(4) (1884) 28 Ch. D. 470.

MAUGHAM J. This is a case of considerable difficulty, but I have formed an opinion and I consider it better to state it at once in case the parties think fit to take the matter to another Court.

The summons is taken out by His Majesty's Attorney-General, who claims that the Crown is a creditor in respect of income tax under Schedule D. The respondent is a person who has been the liquidator of the company since it went into liquidation on December 30, 1925, for the purpose of reconstruction. The claim of the Crown is to be a creditor in respect of three respective sums of 58*l.* 12*s.* tax for the year 1926–27, 20*l.* tax for the year 1929–30, and 487*l.* 16*s.* tax for the year 1930–31; the dates of assessment being March 25, 1930, October 8, 1929, and October 14, 1930. The peculiarity of the case is that these claims for income tax are in respect of profits earned by the company since liquidation while it has been in the hands or under the control of the liquidator. The debts are therefore not provable debts. The Crown claims that the liquidator should be ordered to pay those sums out of moneys in his hands. It so happens that there are no sums at present in hand, but on the contrary the sum of 890*l.* is overdrawn at the bank. Technically, however, the liquidator may have sums in hand as he has retained remuneration at the rate of 1000*l.* per annum, in addition to considerable sums for travelling expenses. Counsel for the Crown suggested that those sums should be struck out of his account and that he should be ordered out of the resulting balance to pay the three sums I have mentioned, but it is admitted that the balance, if any, which may result from an adjustment of accounts with regard to the liquidator's remuneration and travelling expenses, may be liable to a claim by the National Provincial Bank Ld., and this may have to be the subject of further consideration.

There are some points of construction which fall to be decided before the Court can adjudicate on this matter, and in particular it is necessary to consider certain sections of the Companies (Consolidation) Act, 1908 (the relevant Act at the date of the liquidation of the company) and any relevant rules in the Companies (Winding up) Rules, 1909. The first section to be considered is s. 171, the section relating to compulsory winding up by the Court, which is as follows: [His Lordship read it and continued:] Sect. 196, which is one of the group of sections relating to voluntary winding up, namely, ss. 182 to 198, is as follows: [His Lordship read it and continued:] The power of the Court under s. 171, expressed to be given in the cases of compulsory winding up, is a power exercisable in voluntary winding up under s. 193 of the Companies (Consolidation) Act, 1908, under which a liquidator, contributory, or creditor in a voluntary winding up may apply to the Court to determine any question arising therein or exercise any of the powers which the Court might exercise if the company were being wound up by the Court. Rule 187 of the Companies (Winding up) Rules, 1909, makes some express provisions with regard to the costs payable out of the assets, including the remuneration of the liquidator. Paragraph 1 is in these terms: [His Lordship read it and continued:] That rule, of course, does not apply to the present case, which, as I have said, is a case of voluntary liquidation. It may, however, be useful by way of analogy, as showing what the framers of the rules considered to be the fair way of dealing with the case where the assets available were not sufficient to pay the whole of those various costs and expenses in full and to leave anything over for the creditors of the company in the ordinary way. Accordingly, as the rule is not strictly applicable and is not binding on me, I am at liberty to disregard it if I think it just, and in any case the rule is expressed to be subject to any Order of the Court, but I think I ought to express the opinion which I have formed that income tax incurred under Schedule D by a liquidator in carrying on the business of a company after the date of liquidation is not strictly within the words "fees and actual expenses incurred in realising or getting in the assets." It would be going too far, I think, to hold that the rule gives income tax priority over the taxed costs of a petition and a number of other costs which are intended to come early in the scale of priorities. I am more doubtful whether an income tax liability so incurred may not be within the words "the liquidator's necessary disbursements." That, however, is a matter on which I think I had better not express a final opinion at the present time. As I have said, this rule is not of much use to me in the present case.

I turn back to s. 171, and reading that, in connection with this case, with s. 196 of the Companies (Consolidation) Act, 1908, for the purpose of seeing whether the claim to tax such as I have described is one of the expenses of the liquidator, there are two things, I think, to be borne in mind. The first

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is that income tax under Schedule D is a necessary consequence of the acts performed by the liquidator in the course of the liquidation for the purpose of realizing, as it was his duty to do, the assets of the company. In a proper case a business has to be carried on with a view to realization. If it is carried on, as it sometimes is, at a profit, the liability to pay income tax in the case of an English company which is domiciled here is necessarily incurred. The second thing to be borne in mind is that income tax is a Crown debt. That has been established for, I suppose, over fifty years. It is a tax which, under s. 169, sub-s. 1, of the Income Tax Act, 1918 " . . . . may be sued for and recovered, with full costs of suit, from the person charged therewith in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered, as well as by the summary means specially provided by this Act for levying the tax . . . ." the summary means being distraint and committal to prison. I think it is true in the case of a liquidator that he is not personally liable to discharge out of his own moneys income tax incurred in the way I have mentioned, and those summary remedies are not available, but there remains the fact that the tax is one payable as a Crown debt, which may be sued for and recovered in the High Court as a debt due to the Crown. I have a difficulty in seeing how a liquidator who, in the course of his liquidation carries on the business of the company at a profit, the consequence being the assessment of the company to income tax, can avoid the conclusion that this is one of the expenses in the winding up. It is curious that in the authorities to which I have been referred the phrase does not seem to have been used by the Court. In my opinion rates and taxes—and for this purpose I can group them together, although there is for some purposes a distinction between them—falling due subsequently to the winding up are part of the expenses of the winding up. I have been referred to *In re International Marine Hydropathic Co.* (1), *In re National Arms and Ammunition Co.* (2) and other cases. As far

(1) 28 Ch. D. 470.

(2) Ibid. 474.

as I can see the Court, although it has been held that in a proper case sums of the same nature as the sums which I am considering, e.g., rents falling due in respect of property held by the liquidator after the commencement of the winding up, have got to be paid in full, has not thought fit to describe the sums in question as part of the expenses of the liquidation. On the other hand in text books I think such a phrase will be found. I find the phrase " expenses of the winding up," for instance, in Palmer's Company Precedents, 13th ed., Part II., p. 466. It is to be found in other editions (in the fourteenth edition, Part II., at p. 415), and I think the same phrase will be found in other text-books. I do not see any particular reason for limiting the meaning of the phrase "expenses of the liquidation," or " expenses incurred in the winding up." The term is not one of art and I see no reason why it should not include any expenses which the liquidator might be compelled to pay in respect of his acts in the course of a proper liquidation of the company's assets. In my opinion, then, the sums in question are sums which can be properly treated as expenses in the liquidation. I should add that a debenture holder's receiver, in a case where the receiver has been appointed by the Court, is in a different position. Such a receiver is the officer of the Court, and I can see no reason for coming to the conclusion that the liquidator in a voluntary winding up, whose remuneration has been fixed by shareholders who may have no interest in the ultimate assets, is in the same position as an officer of the Court. The latter has his remuneration provided for in front, as far as possible, of every other payment to be made out of the assets of which the Court has assumed control. That that is not the position even of a liquidator in a compulsory winding up appears from the rule which I have already read.

In my opinion, then, it is open to me, in the exercise of a just discretion, the assets being insufficient to satisfy the liabilities, to make an order as to the payment, out of the remaining assets, if any of the costs, charges and expenses, including the remuneration of the liquidator, in such order of priority as the Court may think just. Here comes in what I venture to think is the most difficult part of the task, because the facts are very exceptional, and certainly they give rise to considerations which do not exist in the ordinary sort of liquidation with which the Court is usually concerned.

The company owned and worked mines and railways and other transport facilities in Algeria under a concession from the French government. The difficulties arising in 1925 from fluctuations of French currency made it necessary in the interests of the shareholders to transfer the business to two French companies, one a mining company to acquire and work the mining concessions, and the other a transport company to acquire the railway transport and shipping concession and the assets of that part of the business. There were excepted from the proposal as to transfer to the two French companies cash and other assets which it was thought would be sufficient to pay the preference share capital in full. The ordinary shareholders were going to be remunerated out of the proceeds of the two transfers. A scheme of arrangement was put forward to carry out this arrangement and it was approved by the Court on December 18, 1925. On December 30, following, the company went into voluntary winding up and the person who had been manager of the company was appointed liquidator at 1000*l.* a year. At that time nobody thought the company was insolvent. The two French companies were incorporated and they entered into agreements with the company for the adoption of the scheme, and the Government was applied to for the purpose of permitting a transfer of the concession to the two companies respectively. In the meantime the liquidator had paid certain sums to the preference shareholders. He had paid, I think, five shillings in all by three different payments, and the last one which was paid was on July 2, 1926. The general strike in Great Britain which arose in that year and which caused many repercussions all over the world made it practically impossible to carry this scheme into effect owing to the serious fall in the value of stocks of ore, the advance of freights, and the increase in costs on certain contracts. The French companies were allowed to go into the concessions and to work

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the mines and the railways and other transport facilities, as I understand it, as agents for the liquidator. The stocks of ore had been realized, and the realization produced an aggregate of 170,239*l.* 8*s.*, and the disbursements of the liquidator, including a certain sum paid for income tax in the earlier years, his own remuneration at the rate of 1000*l.* a year, payable monthly, a number of sums for travelling expenses, a number of salaries and other expenses in respect of work in Algeria, amounted in all to 171,125*l.* 11*s.* 4*d.*, so that there is a deficit which is in fact represented by an overdraft at the bank which I have already mentioned. The two concessions and the assets in Algeria have unfortunately not been realized, and before the notification of the assessment of December 8, 1930, being the assessment of the sum of 487*l.* 16*s.* under Schedule D, the liquidator had closed down the mine, paid off all the workmen and retained only the bare minimum staff for the purpose of maintaining and protecting the property and realizing such assets as remained. On the other hand the two French companies, although they passed into liquidation, occasioned the present trouble. The French liquidator took possession of the assets in Algeria which would have been available for the payment of the income tax claims, and he has claimed to be entitled thereto on behalf of the mining and transport companies respectively. That is a claim which is to me, speaking as an English Judge in the absence of evidence of French law, unintelligible. Since the date of the assessments which, I will repeat, are assessments in March, 1929, and March and October, 1930, the liquidator, as appears from the so-called trading account, which is really a cash account, has received substantial sums which I gather to be sums payable on the purchase of ore which he has realized, but I understand there are no such further sums to be received.

In substance the question which I have got to determine seems to me to be this, whether the liquidator is entitled to retain remuneration at the rate of 1000*l.* a year, fixed, as I have already said, by the shareholders of the company, which was deemed to be completely solvent, without any provision being made for the payment of debts which I hold to be part of the expenses of the winding up. The bankers are not here, but I assume that if they were here it would be contended that the overdraft due to them as the result of the liquidator's trading is also an expense of the winding up. Prima facie and in a normal case my opinion is that the whole of the expenses of the winding up ought to be paid before the remuneration of the liquidator. It seems to me, in the normal case, expenses which he has incurred, whether by the employment of agents or, for example, in respect of gas and electric light or for rents, or any other of the numerous expenses which he may incur in the winding up of a company, are things for which he is bound to provide out of the assets of the company as far as he is enabled to recover them. If his position is that, having provided for them, there will be no remuneration left for him, then he is entitled to say: "I cannot go on unless the creditors or shareholders or others will put up a fund for my benefit." He is the person who can see what the position is. The people to whom the company in liquidation has incurred a liability for expenses have not got the materials which he has for ascertaining the true position. There may, however, be cases in which the Court, under the power which I hold the Court has under s. 171 of the Companies (Consolidation) Act, 1908, will provide for the liquidator's remuneration to the extent to which that remuneration ought to be given for services which he has rendered by way of salvage, in a case where the realization of property has long been delayed or has become impossible. Nor do I think the Court ought to be unwilling to declare that the liquidator is entitled to retain the remuneration which he has paid himself out of the assets of the company at a time when he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding up. In my opinion it is impossible on the materials before me to fix exactly the date as from which the remuneration of the liquidator ought to be inquired into, but I think I am justified on the whole, in making an order that the liquidator's remuneration received by him or paid to himself before December 8, 1930 (that being the date of the assessment of 487*l*. 16*s*.) shall not be disturbed. I propose to direct an inquiry as to what remuneration is proper to be allowed to the liquidator for the period subsequent to that date in respect of services rendered which may fairly be regarded as necessary for the preservation of the property belonging to the company.

Solicitors: *Solicitor of Inland Revenue*; *Roney & Co.*

K. R. A. H.

WINGROVE *v.* MORGAN.

[1825. W. No. 1966.]

BENNETT J.
1933
Nov. 14, 28, 29.

Ecclesiastical Law—Welsh Commissioners—Extent of jurisdiction—Welsh Church Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *s.* 11, *sub-s.* 1.

Sect. 11 of the Welsh Church Act confers upon the Welsh Commissioners exclusive jurisdiction over those matters with which they are given power to deal under ss. 8 and 9 of that statute. The provisions of s. 11 have not excluded from the jurisdiction of the Court consideration of matters of dispute between the Welsh Commissioners on the one side and the King's subjects on the other, and it is only when property is vested in the Welsh Commissioners that the purposes of the Act over which they have exclusive jurisdiction arise.

THE following facts are taken from the judgment:—
This is a petition presented by an incorporated body, the Representative Body of the Church in Wales, for the payment out of Court of the proceeds of sale of 1868*l*. 7*s*. 9*d*. 2½ per cent. Consols in Court to the credit of "Wingrove *v*. Morgan in the Parish of Laugharne, Organ Account." The money, which is now represented by the Consols, was paid into Court many years ago and represents a legacy of 1800*l*. bequeathed under the will of Theodosia Langhorne made on March 11, 1822, and who died on November 1, 1822. By her will she bequeathed to the vicar of the parish of Laugharne in the

County of Carmarthen and the churchwardens of the town of Laugharne for the time being and their successors as such vicars and churchwardens the sum of 1800*l.* upon trust that they the said vicar and churchwardens and their successors by and out of the interest dividends and annual produce thereof pay unto her servant Ann Wilken for her long and faithful services one annuity or yearly sum of 20*l.* during her natural life by half yearly payments the first payment to commence at the expiration of six months from the day of the said testatrix's decease and upon further trust that the said vicar and churchwardens and their successors should by and out of such interest dividends and annual produce in testimony of her affection for her brother the late Admiral John Langhorne deceased pay and discharge yearly and every year the whole of the salary of the organist for the time being of the parish church of Laugharne aforesaid and the expense of duly keeping in repair the organ with its appendages and the stove with the copper pipe thereto belonging in the said church which was presented thereto by her said late brother and the expense of providing and keeping a fire in the said stove when and as often as necessary and subject to the several payments and charges upon the trust that the said vicar and churchwardens and their successors should pay apply and dispose of the interest dividends and annual produce of the said sum of 1800*l.*, at Christmas yearly and every year between or amongst all aged and infirm poor men and women legally settled and residing in the said town of Laugharne in such shares and proportions as the said vicar and churchwardens and their successors respectively should deem most proper and necessary. The testatrix's servant, Ann Wilken, is long since deceased.

By an order made in this action on November 3, 1826, it was ordered that after certain payments had been made out of the sum carried over to the credit of the account the dividends from time to time to accrue due on the residue standing in the name of the Accountant General in trust in this cause "The parish of Laugharne in the organ account after such sale as aforesaid be paid to John Williams vicar of the town of

Laugharne or the vicar of the town of Laugharne for the time being until the further order of this Court to be by him applied in payment to the petitioners Esau Edmunds and Ann his wife of the annuity of 20*l*. a year in the petition mentioned by half yearly payments on the 20th day of January and the 20th day of July in each year during the life of the said Ann Edmunds or until the further order of the Court the first of such payments to be made on the 20th day of January next and the residue of such dividends in conjunction with the churchwardens for the time being of the said town of Laugharne upon the trusts and for the purposes directed by the will of the said testatrix Theodosia Langhorne." Since the date of that order down to the date of the disestablishment of the Welsh Church, the vicar of the parish of Laugharne for the time being has received the income from the funds now in Court, and it is alleged in para. 8 of the petition that he has applied them as directed by the order.

This petition is made because of the provisions contained in the Welsh Church Act, 1914, by which the Church of England in Wales was disestablished, and it is claimed by the petitioners that by reason of the provisions contained in that Act and the orders made by the Welsh Commissioners in pursuance of the provisions of that Act, 19/20ths of the fund in Court are now vested in the petitioners, the Representative Body of the Church in Wales, the remaining 1/20th being held upon charitable trusts, with which the Representative Body of the Church in Wales are not concerned and which the petition asks should be paid to the Official Trustee of Charitable Funds.

The question as to the title of the petitioners arises from the following provisions in the Welsh Church Act, 1914. Sect. 4, sub-s. 1, provides: " As from the date of disestablishment there shall, save as by this section provided, vest in the Welsh Commissioners hereinafter mentioned—(*a*) all property vested in the Ecclesiastical Commissioners or Queen Anne's Bounty, which is ascertained as hereinafter mentioned to be Welsh ecclesiastical property; and (*b*) all property not so vested, and not consisting of charges on the common fund of the Ecclesiastical Commissioners, which, at the passing of this Act, belongs to or is appropriated to the use of any ecclesiastical office or cathedral corporation in the Church in Wales, or the holder of any such office as such ; subject, in the case of all such property, to all tenancies, charges, and incumbrances, and to all rights and interests saved by this Act, affecting the property."

Sect. 8 of the Act provides that the Welsh Commissioners "shall by order transfer the property vested in them by this Act (vi.), as follows :—(*a*) they shall transfer to the representative body " inter alia " all private benefactions."

Sect. 11, sub-s. 1, of the Act provides : " Subject to such appeal as is in this Act mentioned, the Welsh Commissioners shall have full power to decide all questions, whether of law or of fact, which it may be necessary to decide for the purposes of this Act, and shall not be subject to be restrained in the due execution of their powers under this Act by the order of any court, nor shall any proceedings before them be removed by certiorari into any court." Then sub-s. 2 provides : " The Welsh Commissioners with respect to—(*a*) enforcing the attendance of witnesses, after a tender of their expenses, the examination of witnesses, and the production of deeds, books, papers, and documents ; (*b*) issuing any commission for the examination of witnesses ; (*c*) punishing persons refusing to give evidence or to produce documents, or guilty of contempt in the presence of the Commissioners or any of them sitting in open court ; and (*d*) making or enforcing any order made by them for carrying into effect this Act ; shall have all such powers, rights, and privileges as are vested in the High Court for such or the like purposes, and all proceedings before the Commissioners shall in law be judicial proceedings before a court of record." Sub-s. 3 provides : " The Welsh Commissioners may review and rescind or vary any order or decision previously made by them or any of them ; but save as aforesaid, and as by this Act provided, every order or decision of the Welsh Commissioners shall be final."

Now, acting under the provisions of the Act, the Welsh Commissioners, or one of them, on May 7, 1930, made two orders, one under s. 7, sub-s. 3, of the Act, which is described as a declaratory order, and the other under s. 8 of the Act, which is described as an order transferring property. The declaratory order, after reciting s. 4 of the Act, s. 7 of the Act, and the date of disestablishment, proceeds as follows: " In pursuance of the provisions of section 7 (3.) of the Welsh Church Act, 1914, the Welsh Commissioners do by this order declare that of the property vested in them by the same Act (other than property transferred from the Ecclesiastical Commissioners and Queen Anne's Bounty) the property referred to in the said Schedule hereto constitutes private benefactions within the meaning of the same Act "—and in the schedule is included: " All that sum of 1868*l*. 7*s*. 9*d*. Consols standing in the name of the Accountant General of the High Court of Justice Chancery Division being property derived under the Will dated 11th March, 1822, of Theodosia Longhorne of Laugharne spinster in the account Wingrove *v*. Morgan." By the transfer order the Commissioners ordered the transfer to the petitioners, the Representative Body, " of the property referred to in the schedule hereto being private benefactions as aforesaid and hereby call for the transfer thereof by the proper officer of the Bank of England." In that schedule, the schedule to that order, is included the sum of 1868*l*. 7*s*. 9*d*., the Consols in question.

His Majesty's Attorney-General was apparently not satisfied with the act of the Commissioner by whom those two orders were made; he considered himself to be aggrieved by the orders and applied for a review and variation of them—and the matters were reheard on July 4, 1933, and there is a document bearing the seal of the Welsh Commissioners dated November 23, 1933, which records the proceedings before them on July 4, 1933. So far as material that document is as follows: " The secretary produced a notice dated the 15th day of October, 1932, and given pursuant to the provisions of section 10 (3.) of the Welsh Church Act, 1914, whereby His Majesty's Attorney-General declared himself to be aggrieved by two orders made by the chairman of the Commissioners The Right Honourable Sir Arthur Griffith

Boscawen both dated the 7th day of May, 1930, whereby inter alia it was declared that certain property to wit 1868*l*. 7*s*. 9*d*. Consols standing in the name of the Accountant-General of the High Court of Justice Chancery Division in the account Wingrove *v*. Morgan constituted a private benefaction within the meaning of the said Act and by which the said property was accordingly transferred to the Representative Body of the Church in Wales. The secretary reported that since the service of the said Notice both His Majesty's Attorney-General and the Representative Body of the Church in Wales had intimated that they would be content if the said orders after having been reconsidered on rehearing by three commissioners should be varied so as to comprise only nineteen-twentieth parts of the said fund so that the remaining one-twentieth part of the said property should be available for the purposes of the trust for the aged and infirm poor of the parish of Laugharne in the County of Carmarthen created by the will of Theodosia Langhorne dated 11th March, 1822. The commissioners thereupon pursuant to s. 10, sub-s. 3, of the Welsh Church Act, 1914, reconsidered both the said orders and being of opinion that although the interest of the aged and infirm poor was contingent and indeed remote it would not be right to regard such interest as falling within the rule of de minimis: and they decided that of the said 1868*l*. 7*s*. 9*d*. Consols referred to in the first part of the respective schedules to the said two orders only nineteen-twentieths parts thereof had vested in them under the provisions of the Welsh Church Act, 1914."

Then, upon the footing of that declaration, they ordered that certain amendments be made to the declaratory order and the transfer order of May 7, 1930, the effect of those orders being to vest in the Representative Body of the Church in Wales, the petitioners in this matter, 19 1/20th parts only of the Consols in Court, which it is now sought to have dealt with on this petition. In addition to altering in that respect the two orders in question, they ordered that there should be inserted into the declaratory order of May 7, 1930, a recital that the Welsh Commissioners had decided that of the total fund mentioned in the first part of the schedule thereto 19 1/20th parts thereof became vested in them on the date of the disestablishment as being property comprised in the said s. 4, sub-s. 1, of the said Act. Now, the petitioners say that, upon the provisions contained in the Welsh Church Act, 1914, and in the orders made by the Welsh Commissioners thereunder, they have established their title to the fund in Court, and that this Court has no right to consider whether, upon the language of s. 4, sub-s. 1 (*b*), the Consols in question vested in the Welsh Commissioners and were capable of being transferred by them to the petitioners.

Roger Turnbull for the petitioners. The Welsh Commissioners have, in the present case, taken a certain view and thought fit to come to a decision. Sect. 11 gives them power to decide whether property vests in them as against individuals who claim it. It is a peculiar power, but Parliament has given it to them and there is no appeal against their decision, except as provided by the Act. The section gives them full power and there is no reason why its meaning should be cut down.

C. Stafford Crossman for the Attorney-General. The Attorney-General has taken the view that the order was binding and that the Act would otherwise be unworkable. The Welsh Commissioners are not a body opposed to private individuals, but are the tribunal set up by Parliament for the purpose of deciding the question. Sect. 11 is applicable because, for the purposes of the Act, it is necessary for the Commissioners to decide what property vests in them.

BENNETT J. [after stating the facts as above set out, continued :] The petitioners' argument is that that question is one which is exclusively confined to the jurisdiction of the Welsh Commissioners, and that argument is based upon the language of s. 11, sub-s. 1, of the Welsh Church Act, which gives the Welsh Commissioners "full power to decide all questions, whether of law or of fact, which it may be necessary to decide for the purposes of this Act." On the original hearing of the petition a fortnight ago I suggested to the petitioners' counsel that there would be no difficulty in his way if he could persuade me by argument that 19/20ths of the fund in Court upon the language of s. 4, sub-s. 1 (*b*), vested in the Welsh Commissioners, and I adjourned the petition for the express purpose of enabling him to consider whether he would address such an argument to me. When the petition came back for rehearing to-day he said after consideration his instructions were not to argue any such question and that his instructions were that upon all questions as to what vested in the Welsh Commissioners they were the sole judges. I am not prepared to accept that view. It seems to me that the consequences of doing so may be startling. The question to be decided may be whether the property of one of the King's subjects remains his or is vested in the Welsh Commissioners, and the argument is that the effect of the language in s. 11 of the Act is to constitute the Welsh Commissioners the sole judges of that question. Parliament, of course, may have made a party to a dispute judges in their own cause, but it seems to me that one would need very plain language before one could conclude that that was the intention of Parliament, and, in my judgment, that interpretation ought not to be put upon the language which one finds in s. 11 unless that is the only possible interpretation. In my judgment, those matters over which the Welsh Commissioners are given exclusive jurisdiction are such matters as they are given power to deal with by s. 8 and by s. 9. It seems to me that it is only when property is vested in them that the purposes of the Act over which they have exclusive jurisdiction arise, and that the language of s. 11 has not excluded from the jurisdiction of this Court consideration of matters of dispute between the Welsh Commissioners themselves on the one side and the King's subjects on the other. In those circumstances, as the matter stands, and no argument has been addressed to me as to whether or not the fund in Court is within the scope of s. 4, sub-s. 1 (*b*), of the Welsh Church Act, 1914, the petitioners have not made out, in my judgment, their title to present the petition, and, accordingly, I propose to dismiss it.

Solicitors: *Deacon & Co., for Barker, Morris & Owen, Carmarthen; Treasury Solicitor.*

J. L. D.

NOTE.

The petitioners appealed, and by their notice of appeal asked that after payment of the costs 19/20ths of the balance of the fund in Court should be paid to the Representative Body of the Church in Wales and one-twentieth to the Official Trustees of Charitable Funds. The appeal was heard on March 22 and 23, 1934.

Vaisey K.C. and *Roger Turnbull* for the appellants.
Andrewes-Uthwatt for the Attorney-General.

Whilst the appeal was being opened, counsel for the Attorney-General stated, in answer to an inquiry by the Court, that he was satisfied that the interest of the lay charity did not exceed one-twentieth of the fund in Court and therefore that he was prepared to consent to the Court making the order asked for by the appellants.

In these circumstances the Court of Appeal (Lord Hanworth M.R., Romer and Maugham L.JJ.) made the order asked for without expressing any opinion on the question argued before Bennett J.

H. C. G.

In re A BANKRUPTCY NOTICE.

[No. 171 of 1934.]

C. A.
1934
March 23.

Bankruptcy Notice — Counterclaim, set-off or cross-demand — Pending Chancery proceedings by Debtor against Creditor—Subsequent action in King's Bench Division by Creditor against Debtor in respect of different transaction—Judgment obtained—Claim by Debtor to set-off—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*g*)—*Bankruptcy Rules,* 1915, *r.* 140, *sub-r.* 2.

In a pending action in the Chancery Division a debtor claimed a declaration that he was entitled to a charge on the proceeds of certain property in the hands of trustees in priority to the creditor. In a subsequent action in the King's Bench Division brought by the creditor against the debtor in respect of a different transaction the creditor obtained judgment in respect of which he issued a bankruptcy notice. On an application by the debtor under s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside:—

Held, that the claim in the Chancery action was not a "counter-

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1934
A BANKRUPTCY NOTICE, *In re.*

claim, set-off or cross-demand" within the meaning of the sub-section, and was not therefore a ground for setting aside the bankruptcy notice.

APPEAL from Mr. Registrar Warmington setting aside a bankruptcy notice.

In April, 1933, the debtor commenced proceedings in the Chancery Division against the creditor and two other persons who were trustees. In that action he claimed that he was entitled to two charges amounting together to 2750*l.* on certain properties for moneys advanced in respect of a transaction in which the debtor and the creditor were interested and asked for a declaration that on the sale of the properties the debtor and creditor were entitled to a half share each in any profits resulting from the transaction and to have an account taken. The creditor denied that the debtor had any such rights. Notice of the trial of this action had been given and it was expected that the action would shortly be heard.

On September 15, 1933, the creditor commenced an action in the King's Bench Division against the debtor based on a covenant in a mortgage deed claiming a sum of 2057*l.* 2*s.* 11*d.* This mortgage had no connection with the properties or the transaction the subject of the action in the Chancery Division. The debtor admitted the liability but disputed the amount, and after a hearing before an Official Referee the creditor obtained judgment on January 16, 1934, for 1249*l.* 9*s.* 1*d.*, and on January 23, 1934, issued the bankruptcy notice.

The debtor thereupon applied under s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside on the ground that he had a cross-demand against the creditor which exceeded the amount of the sum claimed by the debtor and which he could not have set up in the King's Bench action.

On February 20, 1934, the Registrar delivered a considered judgment in the course of which he said that the claim in the Chancery action was in his opinion a cross-demand against the creditor. It was true that in form it did not ask for direct payment from him, but in substance the allegation was that the creditor retained under his control property of the debtor in the form of denying a charge for a sum of money and a half share of profits and by so doing was keeping the debtor's money. He further considered that this cross-demand could not have been set up in the action. The action already existed before the creditor issued his writ in the King's Bench Division. The writ dealt with a wholly unrelated cause of action and the creditor was not entitled to demand of the debtor that he should stop his action in the Chancery Division and attempt to get it reinstated as a counterclaim or a simple money demand in the King's Bench action. He therefore ordered that the bankruptcy notice should be set aside, the creditor being at liberty if the action should be decided in his favour to serve another bankruptcy notice.

The creditor appealed.

G. O. Slade for the creditor.

H. B. L. Braund for the debtor.

LORD HANWORTH M.R. This appeal raises an interesting point in bankruptcy law. The facts are these. The debtor had some complicated transactions which led him in April of last year to bring an action against three persons with whom he had been associated in dealing with certain property. The statement of claim starts by stating that there was an agreement made for the sale of certain properties between the London Midland and Scottish Railway Company and a company called Upton Park Estates, Ld. By that agreement there was to be conveyed to the Estates Company some property called "the Walworth Road premises," and it was duly conveyed. The terms of payment were that a certain sum, a portion of the sum to be paid, should remain on mortgage, and that mortgage should be paid off by instalments, to be paid over a period of years, of 1401*l.* 8*s.* 4*d.* on June 24 in each year. Now in respect of the property so obtained there was what might be called, I suppose, a development scheme, under which certain money was to be laid out upon that property, and I suppose the profit obtained as a consequence of that was to be spent upon the property. Then in para. 5 of the statement of claim it is alleged that the debtor by an oral agreement agreed to provide, and did provide, a sum of 1350*l.* which was to be laid out upon the property. Then there is a further claim that on one occasion one of these instalments due to the railway company was not forthcoming from the Upton Park Estates, Ld., and so by an oral agreement the money was provided at the oral request of the defendant, who is now the creditor, by the present debtor. It was claimed that the result of these transactions was this, that the plaintiff, that is the debtor, should be subrogated to the railway company's security for the said instalment ; in other words, whereas the railway company was entitled to be paid as mortgagees this sum of 1401*l.* 8*s.* 4*d.*, the debtor claims that by the oral request of persons interested he has been subrogated to the rights which belonged to the railway company for the enforcement of the payment of that sum. Then the prayer includes a claim for a number of declarations under which, if all goes well, it is hoped that when the matter has been carried to a proper conclusion there will be a sum which the debtor is entitled to be paid and that by means of subrogation to the security of the railway company it will ultimately emerge on the sale of the property that there is to be paid to him this 1401*l.* 8*s.* 4*d.*

That action was commenced in April, 1933. The defences were delivered after some delay, a delay which I dare say is easily explained, the last one by the last defendant on December 7 of last year. The action has now been set down for trial, and we understand it is shortly to be heard in the course of next term before the learned judge who is taking long witness actions. In the meantime an action was brought by the present appellant, the creditor, in September, 1933, against the present debtor. The matter involved a question of amount only, and the result was that after a hearing before Mr. Pitman K.C., an Official Referee, judgment was obtained by the present appellant against the debtor for a sum of

1240*l.* 9*s.* 7*d.* on, I think, January 9 of this year. The position, therefore, was this, that the present creditor was entitled to be paid the sum of 1240*l.* 9*s.* 7*d.* by a judgment obtained in the early part of January of this year. In the meantime, in the Chancery proceedings which were sauntering along, the plaintiff had certain rights in respect of land as to which he had contributed certain sums, which he hopes to be paid if and when that Chancery action is brought to a conclusion, and, if I understand it aright, if the property is sold the money can be raised to pay him. It must be noticed that in that Chancery action there is no claim against the present creditor in respect of any personal liability charged against him.

A bankruptcy notice was issued by the present appellant on January 23 of this year, requiring payment in the ordinary course within seven days from the debtor, and that bankruptcy notice contained, as the rules demand that it shall contain, the statement: "You must either pay or compound the sum demanded, or you must satisfy the Court that you have a counterclaim, set-off or cross-demand against the creditor, which equals or exceeds the sum claimed by him, and which you could not set up in the action or other proceedings in which the judgment or order was obtained." Dealing with that last point first, I think it may fairly be said that it would have been difficult and probably inconvenient if any actual claim had been transferred from the Chancery proceedings to the King's Bench proceedings as an answer to the claim made against the debtor in that action, which was not commenced until September of last year, when the Chancery proceedings were well on their way and when the statement of claim had already been delivered, as it was in the previous July. At the same time the debtor has to show either that he has paid or secured or compounded the said sum, or he must satisfy the Court that he has a counterclaim, set-off or cross-demand against the creditor.

The learned Registrar before whom the matter came took time to consider his judgment, and in a judgment which has been helpful to the Court he came to the conclusion that he would set aside the bankruptcy notice on the ground that the debtor has some claim which may sound in money against the creditor, with the result that the creditor's proceedings on the bankruptcy notice are not so conclusive against the debtor as to justify that bankruptcy notice being maintained. From that decision of the Registrar an appeal is now brought to this Court.

It is necessary for the purpose of this judgment to remind ourselves of what is the proceeding which is allowed by a bankruptcy notice. Sect. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, provides: "If a creditor has obtained a final judgment or final order against him [that is the debtor] for any amount, and, execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, and he does not, within seven days after service of the notice . . . . either comply with the requirements of the notice or satisfy the court that he has a counter-claim set off or cross-demand which equals or exceeds the amount of the judgment debt . . . . and which he could not set up in the action in which the judgment was obtained," then that non-compliance is an act of bankruptcy on which a petition can be founded. Turning to s. 2 it will be observed that there are certain conditions which are laid down in that section and the proviso which are closely to be attended to in relation to the bankruptcy notice which is issued under sub-s. 1 (*g*). Turning to the Bankruptcy Rules, 1915, r. 140, sub-r. 2, provides that certain details are to be contained in the bankruptcy notice, and it says: "There shall be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action" then he must within the time specified in the notice file an affidavit to that effect with the Registrar, and (r. 141) if he does so the filing of such an affidavit is to operate as an application to set aside the bankruptcy notice, and thereupon the Registrar has to fix a day for hearing the application. What the Registrar has to hear and determine upon such affidavit is: Was there a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt? The learned Registrar has satisfied himself that the conditions have been sufficiently complied with by the debtor, and that the bankruptcy notice ought to be set aside. We have come to a different conclusion. The question really turns upon whether or not the proceedings, which are now taken and which are reaching an end in the Chancery Division, provide "a counter-claim set off or cross-demand which equals or exceeds the amount of the judgment debt." At the conclusion of them it may be that the plaintiff will have established that he is entitled to receive the money, 1350*l.* and 1401*l.* But, although that may be ultimately paid to him, is that such a counterclaim, set-off or cross-demand, with the concomitant condition that it equals or exceeds the amount of the judgment debt, that it overtops or cancels out the creditor's right to have the debt in respect of which he has a judgment paid by means of the execution provided under a bankruptcy notice?

Now one can deal quite shortly with these three points. It is unnecessary at the present moment to define precisely what is meant by those words. What claims are included in the words "counter-claim, set-off or cross-demand"? With regard to the word "set-off," that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off. With regard to a counterclaim, that is a creature of the Supreme Court of Judicature Act, 1873. By s. 24, sub-s. 3, it was provided that the Courts should have the power to hear a counterclaim, a matter which could not until that time have been included in the same action. Under that sub-section the defendant is enabled to set up by way of counterclaim a claim which he might have had against the plaintiff, and that is to be heard in the action started by the plaintiff against him, and rules are provided for that purpose. That sub-section is now s. 39 of the Supreme Court of Judicature

(Consolidation) Act, 1925, the Act which consolidates all the Supreme Court of Judicature Acts. The debtor's claim in the Chancery action does not appear to be in the nature of a counterclaim. It is certainly not a claim which can be at the moment so definitely quantified as to be described as necessarily equalling or exceeding the amount of the judgment debt. It is a claim which may inure to the benefit of the plaintiff, and he may be able ultimately to receive a sum, but, so far as the position can be taken at the present time, it is difficult to say that it equals or exceeds the amount of the judgment debt.

I turn, therefore, to what to my mind is the wider word, "cross-demand." If a cross-demand is only to be interpreted as meaning something which could have been introduced into the action by way of counterclaim, it adds nothing to the word "counterclaim." "Cross-demand" seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counterclaim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt. I do not desire to say what "cross-demand" may include, but it is not difficult to say that it does not include a claim of such uncertain nature as appears in these Chancery proceedings. That claim does not appear to be one which it would be proper to describe as a cross-demand; it is a claim of right which may inure ultimately for the benefit of the judgment debtor. Therefore, it appears that there is no sufficient ground for setting aside this bankruptcy notice; the bankruptcy notice stands good and must be complied with.

It would not, however, be right to leave the creditor in the belief that he has surmounted all his difficulties, because when the bankruptcy notice has not been complied with and the act of bankruptcy is complete the creditor has a right to present a petition for bankruptcy. Then comes the duty of the Court to consider the effect of s. 5, sub-s. 3, of the Bankruptcy

Act, 1914, under which a discretion is given to the Court to refuse to make an order upon a petition and to dismiss it. I do not wish it to be supposed that by this decision we have in any way determined or indicated what the decision ought to be if the powers of sub-s. 3 of s. 5 are hereinafter invoked; upon that I give no opinion and no indication at all.

The result is that this appeal must be allowed with costs.

ROMER L.J. I agree, and I have only a very few words to add. The words with which we are confronted in this case are the words in s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, which are that the debtor has to "satisfy the court that he has a counter-claim set off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid." Strictly, of course, a claim or a demand cannot exceed or be equal to or less than the amount of the judgment debt; it is obviously the thing which is claimed or demanded that has to be compared with the amount of the judgment debt. Some things that are claimed or demanded obviously cannot be compared with the amount of the judgment debt. It would be impossible to say that a declaration or an injunction could equal or exceed the amount of a judgment debt, and there are obviously other things which cannot be compared with the amount of a judgment debt. These words seem to me to refer to a case where the judgment debtor is claiming to receive from the judgment creditor something which can properly be said to equal or exceed the amount of the judgment debt. I cannot accede to the suggestion made by Mr. Braund that the words are satisfied if the judgment debtor is claiming to have an interest in something in the hands of and properly retained by a third party ranking in priority to the interest in that thing claimed by the judgment creditor. This case falls within that category. The judgment debtor is here saying that the proceeds of certain property which is at present in the hands of and properly retained by third parties, will, when the proceeds come to be distributed, be payable to him in priority to the judgment creditor. Such a

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A BANKRUPTCY NOTICE, *In re.*

claim as that, in my opinion, is not within the words of the sub-section.

MAUGHAM L.J. I am of the same opinion. The question involved is really a question of the true construction of s. 1 of the Bankruptcy Act, 1914, which begins with the words: "A debtor commits an act of bankruptcy in each of the following cases," and then follow a number of cases which in the view of the Legislature involve the conclusion that the debtor ought to be made liable. In sub-s. 1 (*g*) we find the part material to the present case, which, reading it shortly, says: If a creditor has obtained a final judgment against a debtor for any amount, and execution thereon not having been stayed, has served on him a bankruptcy notice and the debtor does not within seven days comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained. Prima facie if there is any ambiguity about any part of that sub-section, it may perhaps be resolved by a consideration of the other sub-sections, that is to say, by a consideration of the context in which it is to be found. If a creditor has a final judgment against a debtor and the debtor can satisfy the Court that he has an answer to the claim of the creditor, it is quite clear that ought not to be treated as an act of bankruptcy.

Now, the first question which arises I think or, at any rate, the first question I would like to deal with, is the question as to the context in which the word "has" is used. The debtor must satisfy the Court that he *has* a "counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt." There this Court has no difficulty, because the Court of Appeal in *In re G. E. B.* (1), with considerable regret in the peculiar circumstances of that case, came to the conclusion that the section means a counterclaim, set-off, or cross-demand which is effective at the time

(1) [1903] 2 K. B. 340.

of the hearing of the application to set aside the bankruptcy notice. It was decided by Vaughan Williams L.J., who was a great authority on this branch of the law, and his view was agreed with by Romer L.J. and Stirling L.J. Another thing which, in my opinion, is clear is, that the words "counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt" are words which refer to a counter-claim, set-off, or cross-demand against the creditor; the statute does not use those precise words, but it is perfectly obvious that that is intended. With regard to the words "which equals or exceeds the amount of the judgment debt," I agree with Romer L.J. that that must mean or refer to a claim against the creditor, either for money, or, at any rate, for money or property of value which equals or exceeds the amount of the judgment debt. For instance, it is possible, although the question does not arise here, if the creditor possessed a bag of diamonds belonging to the debtor of a value exceeding the amount of the judgment debt, this bankruptcy notice would be set aside. That, as I say, may very well be the case. If we are considering the word "cross-demand" in the present case, it has to be a cross-demand against the creditor effective at the time of the hearing of the application to set aside the bankruptcy notice, either for an amount equal to or exceeding the amount of the judgment debt or, at any rate, for property of the value which at that moment exceeds the amount of the judgment debt. If that construction is correct, I think it only requires a consideration of the statement of claim in the Chancery action, the nature of which has been stated by the Master of the Rolls, to arrive at the conclusion that the debtor cannot bring his cross-demand within the definition. As already pointed out, there is property in the hands of the third parties in the Chancery action to which they are partially entitled as trustees, and it has not been shown that at the present date the debtor has money or property in the hands of the creditor which amounts to or is in value equal to the amount of the judgment debt.

On those grounds it seems to me that the present order by the learned Registrar is wrong and that the appeal must be allowed with costs.

I would only wish to add, following what has been said by the Master of the Rolls, that it does not therefore follow that there will be an adjudication, because, contrary to the position with regard to a receiving order, the Court has a judicial discretion under the Act whether it will or will not adjudicate a man bankrupt on a creditor's petition. It may be, as he has pointed out, if the facts are established they will justify the view that this is not a case in which there should be such an order.

Appeal allowed.

Solicitors for appellant: *Stafford Clark & Co.*
Solicitor for respondent: *Herbert W. T. Smith.*

W. I. C.

EVE J.
1934
March 28.

DAVIS *v.* SYMONS.

[1933. D. 1551.]

Mortgage—Clog on redemption—Mutual covenants—Lender not to require payment of principal for twenty years or until earlier death of borrower—Borrower not to redeem for similar period—Mortgage of policy maturing before expiration of period—Policy moneys payable to lender—Covenant restricting assignment of equity of redemption—Policies irredeemable.

A mortgage of land together with an endowment policy on the life of the mortgagor, made in 1926, contained mutual covenants between mortgagor and mortgagee that the principal sum should be allowed to remain on the security for a period of twenty years, or until the earlier death of the mortgagor, and so long as interest was punctually paid, and there was no breach of covenant, should not be called in by the mortgagee during the same period. The covenants in the mortgage were made applicable to a further charge given in 1926, by which another endowment policy was mortgaged. This policy would mature in 1942, and the further charge provided that if the mortgagor survived the date of maturity, the policy moneys with profits should be paid to the mortgagee in reduction of the mortgage debt. The other policy also would mature before the date for redemption:—

Held, that the postponement of redemption for twenty years, together with the other provisions which made the policies in effect irredeemable, was a clog on the equity, and that the mortgagor was entitled to judgment in an action for redemption.

ACTION.

By a mortgage dated November 25, 1926, a messuage and premises No. 15 Swain's Lane, St. Pancras, together with an endowment life policy for 2250*l.*, effected by the plaintiff (the mortgagor) on his life were mortgaged to the defendant to secure an advance of 2750*l.* with interest at 7½ per cent., reducible on punctual payment to 6½ per cent. per annum. The mortgage contained (clause 6) the following covenant:—

"The lender hereby covenants with the borrower that if on either of the quarter days hereinbefore fixed for payment of interest or within fourteen days next after such day and continuously during the period of twenty years from the date hereof or until the death of the borrower whichever shall first happen there shall be paid to the lender interest on the principal sum hereby secured and all premiums on the said policy shall be paid, and there shall be no breach of covenant, then the lender will not before the expiration of the said twenty years or the earlier death of the borrower require payment of the principal sum or of any part thereof. And the borrower hereby covenants with the lender that the whole of the principal sum hereby secured shall be allowed to remain on this security until the expiration of the said twenty years or the death of the borrower whichever shall first happen."

The plaintiff gave a further charge, dated August 5, 1927, to the defendant over the above mentioned premises and another policy for 750*l.* on his life, to secure a further advance of 500*l.*, and all covenants in the mortgage were made applicable to the new charge.

The effect of the covenants was to postpone redemption until November 25, 1946. The policy for 2250*l.* comprised in the mortgage matures on November 18, 1946, eight days before the expiration of this period. The other policy, for 750*l.*, matures in 1942, and by the further charge it was provided that if the mortgagor survived the date of maturity the policy moneys with profits were to be paid to the mortgagee. The mortgage also contained a special covenant by the mortgagor not to sell the equity of redemption except to a responsible person.

The plaintiff brought this action for redemption and pleaded that the length of the term of twenty years and other advantages to the mortgagee contituted a clog on the equity from which he was entitled to be relieved. The defendant admitted that he claimed that the plaintiff was not entitled to redeem the mortgage or the further charge until November, 1946, or the earlier death of the plaintiff, but denied that this amounted to a clog on the equity of redemption.

L. W. Byrne for the plaintiff. The covenants in the mortgage constitute a clog on the equity of redemption, are of an oppressive and unreasonable nature and are void. The mortgage is not redeemable for a period of twenty years. That period was held by Lord Macnaghten, delivering the judgment of the Privy Council in *Fairclough* v. *Swan Brewery Co., Ld.* (1), to be long enough to entitle the mortgagor, notwithstanding, to redeem, but in that case the mortgage was of a lease for the residue of a term of twenty years, so that it was virtually irredeemable.

A mortgagor may be precluded from redeeming the mortgage for a reasonable period, such as five or seven years: *Teevan* v. *Smith* (2); but in *Morgan* v. *Jeffreys* (3) a period of twenty-eight years was held to be unreasonably long. In *Cowdry* v. *Day* (4) the covenants were mutual as here, and the period was twenty years, which the Court held was too long. [Counsel also referred to *Lawless* v. *Mansfield* (5); *In re Hone's Estate* (6); *Biggs* v. *Hoddinott* (7); *Kreglinger (G. & C.)* v. *New Patagonia Meat & Cold Storage Co., Ld.* (8), per Lord Parker of Waddington; *Noakes & Co., Ld.* v. *Rice* (9); *Samuel* v. *Jarrah*

(1) [1912] A. C. 565.
(2) (1882) 20 Ch. D. 724.
(3) [1910] 1 Ch. 620.
(4) (1859) 1 Giff. 316.
(5) (1841) 1 Dr. & War. 557 (Ir.).
(6) (1873) Ir. R. 8 Eq. 65.
(7) [1898] 2 Ch. 307.
(8) [1914] A. C. 25, 53.
(9) [1902] A. C. 24.

Timber & Wood Paving Corporation, Ld. (1); *In re Fortescue's Estate.* (2)]

J. V. Nesbitt for the defendant. There is no reported case in which redemption has been postponed merely for a term of years, and that has been held to be a clog on redemption. In all cases of the kind there has been some other extraneous fact to avoid the mortgage. In *Morgan* v. *Jeffreys* (3) Joyce J. would have decided in favour of the mortgagee if the covenants had been mutual, as they are here. But in that case there was no provision against calling in the mortgage. The only question is whether a mortgage is invalid because the mortgagor is not entitled to pay it off for twenty years. No authority has gone so far as to hold that it is. If money had not become cheaper, and the bank rate gone down, there would have been no suggested clog on the equity of redemption.

The cases of tied houses, such as *Fairclough* v. *Swan Brewery Co., Ld.* (4); *Noakes & Co., Ld.* v. *Rice* (5), are in a separate class. In the former case the House of Lords held that the proviso for redemption was nugatory, but that, apart from that, the mortgage was not unreasonable.

L. W. Byrne in reply. There is a one-sided provision in clause 6 of the deed of further charge, whereby part of the mortgage may be paid off, when the policy matures, but there is no right to redeem. Any moneys that become payable under the policy are to be applied in reduction of the debt.

The effect of these stipulations is that the plaintiff is unable to deal with the property. *Kreglinger's* case (6), *Biggs* v. *Hoddinott* (7), and *Noakes & Co., Ld.* v. *Rice* (5) were all cases of collateral bargains made in favour of the mortgagee on the advance, securing advantages to endure beyond redemption.

[*Gossip* v. *Wright* (8), and *Cromwell Investment Co., Ld.* v. *Western* (9) were also referred to.]

Eve J. In this, as in every other case where a party to a

(1) [1904] A. C. 323.
(2) [1916] 1 I. R. 268.
(3) [1910] 1 Ch. 620.
(4) [1912] A. C. 565.
(5) [1902] A. C. 24.
(6) [1914] A. C. 25, 53.
(7) [1898] 2 Ch. 307.
(8) (1863) 32 L. J. (Ch.) 648.
(9) [Not reported].

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contract seeks to be relieved from a term of the contract, it is incumbent upon him to satisfy the Court that he has made out a case for such relief.

The plaintiff is a mortgagor under a mortgage of November 25, 1926, and a further charge of August 5, 1927. The mortgaged premises are a freehold messuage known as No. 15 Swain's Lane, St. Pancras, and two endowment policies for 2250*l.* and 750*l.* respectively, effected on the plaintiff's life with the National Mutual Life Association of Australasia, Ld. The mortgage debt is a sum of 2750*l.*, bearing interest at 7½ per cent., reducible on punctual payment to 6½ per cent. The defendant is the mortgagee.

By clause 6 of the mortgage the mortgagee covenanted that he would not until the expiration of twenty years from the date of the deed or the death of the borrower, whichever should first happen, require payment of the principal sum thereby secured or any part thereof, and the mortgagor covenanted that the whole of the principal sum thereby secured should be allowed to remain on the security until the expiration of the said period of twenty years or his death, whichever should first happen. By the further charge, which is dated August 5, 1927, it is provided that "All covenants and provisions contained in and subsisting in relation to the Principal Deed (except the covenant for payment of principal and interest but including the provision for reduction of interest to 6½ per cent. per annum on punctual payment) shall be applicable for securing the payment of the said sum of 500*l.*"—that was the further advance—"and the interest thereon and for enforcing and defining the rights of the parties under the security hereby constituted as if the said sum of 500*l.* and interest thereon had formed part of the principal money and interest thereon respectively payment whereof is secured by the principal deed and as if the further policy hereby assigned had been comprised in the principal deed."

The effect of the deeds so far is to postpone the defendant's right to require payment and the plaintiff's right to redeem to November 25, 1946, or the plaintiff's earlier death. The plaintiff asserts that this provision is of an oppressive and unreasonable nature, and claims a declaration to that effect and an immediate judgment for redemption in the ordinary form. The defendant admits that he claims that the plaintiff is not entitled to redeem the said mortgage and further charge before November 25, 1946, or the earlier death of the plaintiff; he denies that the claim is wrongful, and in these circumstances the question between the parties resolves itself into this, whether the provision of the deeds whereby the date of redemption is postponed to 1946 is reasonable and binding on the plaintiff, or whether it is an unreasonable fetter upon his right to redeem.

The authorities, to all of which my attention has been drawn in the course of the argument, establish undoubtedly that the mere postponement of the date for redemption for a moderate and reasonable period does not, in the absence of other circumstances, avoid the contract.

In *Teevan* v. *Smith* (1) Sir George Jessel states the law in these terms: "Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem,' are inserted."

In *Cowdry* v. *Day* (2) the opinion was expressed that twenty years' postponement might be too long, and in Ireland eight years and ten years have been treated as permissible: see *In re Hone's Estate* (3) and *In re Fortescue's Estate.* (4) In *Morgan* v. *Jeffreys* (5) Joyce J. regarded a proviso against redemption for twenty-eight years as beyond all reasonable limits. But it is to be noted that in this last case, and in some of the others cited to the Court, the absence of a reciprocal covenant on the part of the mortgagee not to call in his money for a like period had been regarded as an important consideration in estimating the reasonableness of the fetter imposed on the right to redeem. In *Cowdry* v. *Day* (2) and in *Morgan* v. *Jeffreys* (5) there were certainly other relevant matters to which the attention of the

(1) 20 Ch. D. 724, 729.
(2) 1 Giff. 316.
(3) Ir. R. 8 Eq. 65.
(4) [1916] 1 I. R. 268.
(5) [1910] 1 Ch. 620.

Court was directed and which of themselves would seem to have been sufficient to warrant the conclusions at which the Court arrived. I do not think any of the cases where there is an absence of mutuality assist very much in determining what is reasonable in cases where both parties are bound to a fixed term. In determining the simple question whether any particular postponement is extravagant and oppressive the absence of a corresponding restraint on the mortgagee must be regarded as an important factor, but in cases where it is not suggested that there has been any over-reaching, where there are mutual covenants binding on mortgagor and mortgagee, and where each party may be regarded as of an age and competency to decide what was most beneficial to himself, I do not see why one of them should be allowed to escape from his contract merely because the postponement is a long one and, as events have turned out, he would have been better off had he adopted a different attitude at the date of the mortgage. I am not prepared to say that in the absence of other relevant factors the Court would, in circumstances such as I have just referred to, regard a period of twenty years as unreasonable; no doubt the longer the suspensory period the more incumbent it is to consider whether there are any provisions in the contract calculated to make the ostensible mutuality more apparent than real. In other words the question whether the contract is reasonable or not cannot be decided without a full examination of the whole deed. Mr. Byrne, adopting that procedure on behalf of the plaintiff, invites the Court to take into consideration the fact that the two policies are irredeemable. They constitute an important part of the defendant's security, and both mature during the twenty years—the larger one some eight days and the smaller one some four years before the twenty years' period expires. Moreover, the smaller one maturing in 1942 stands as security for the old loan, and there is a provision in the further charge under which if the mortgagor survives the maturity of the policy in 1942, the policy moneys are to be paid to the mortgagee. The money will represent the 750*l.*, for which the policy was effected, plus any profits which may have accrued in the long period since it was effected. At the date when it becomes payable, those profits may represent a considerable sum. So that although the mortgagor may not redeem for twenty years, the mortgagee is put in this position, that notwithstanding the covenant that he will not call in the principal moneys during twenty years, he must in fact, if matters proceed according to the contract, receive a considerable sum in payment off of part of the mortgage four years before the suspensory period comes to an end. It is true that this was the covenant made, and I am not saying that it may not have been quite right, but it is a position which has to be considered as one which results from the postponement of the right to redeem.

The other policy, in like manner, will have been paid off eight days before the plaintiff's right to redeem arises, and in substance the policies are irredeemable, and in the case of the smaller one the mortgagee gets a distinct benefit by reason of the fact that, in the currency of the twenty years during which it is covenanted that the money shall not be repayable, he will in fact receive the considerable sum payable on the maturity of that policy.

There is another provision which is certainly not usual in mortgages—I do not know that I ever saw it myself, but it may be that others with larger experience have seen it. It is no doubt a useful one from the mortgagee's point of view, but must I think hamper the mortgagor to an unreasonable extent. It is a special covenant on the part of the mortgagor whereby he covenanted not to sell the equity of redemption except to a responsible person. It may well be that this was inserted owing to the fact that the mortgagor covenanted to pay the premiums on the policies.

Mr. Byrne's argument pressing the consideration of the whole contract compels me to hold that there is very little mutuality in the respective covenants dealing with the period of postponement, and that the contract is not one on which the mortgagee can insist. If the twenty years' period had stood alone, unaffected by these other matters, I am not sure that I should not have felt justified in saying that the contract

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was binding; but as those who have preceded me have done, I must take into account all the facts, and having done so I think the plaintiff is entitled to succeed. There will be a declaration that the plaintiff is at liberty to redeem, on six months' notice, with liberty to apply. By consent, there will be no order as to costs.

Solicitors: *Blakeney & Co.*; *King-Hamilton & Green.*

H. L. L.

MAUGHAM J.
1933
Dec. 13, 14.

GRAMOPHONE COMPANY, LIMITED *v.* STEPHEN CAWARDINE AND COMPANY.

[1933. G. 456.]

Copyright—Musical record—Copyright in original—Copyright in record—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 19, *sub-ss.* 1, 2; *s.* 35, *sub-s.* 1.

By s. 19, sub-s. 1, of the Copyright Act, 1911: "Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts."

By sub-s. 2: "It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

(*a*) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, ..."

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By s. 35, sub-s. 1: "In this Act, unless the context otherwise requires, ... 'Plate' includes any . . . . matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made. . . . ."

The plaintiff company made records of a work in the public domain, one of which was bought by the defendants and played publicly on their premises:—

Held, (1.) that owners of a subsisting original copyright under s. 1 can restrain public performance by owners of a special copyright under s. 19, which is subordinate to copyright under s. 1, though it may co-exist with it;

(2.) that an owner of a special copyright under s. 19 in a record has the sole right to use the record for public performance except as against the owner of a subsisting original copyright.

WITNESS ACTION.

This was a test action brought in order to obtain a definition by the Court of the rights under the Copyright Act, 1911, of the manufacturers of gramophone records.

The Gramophone Company, Ld. (hereinafter called "the company"), manufactured and sold gramophone records, and the defendants were proprietors of tea and coffee rooms. On or about October 28, 1931, the company made an original plate, from a performance by the London Symphony Orchestra, of the overture to "The Black Domino," composed by Auber in 1837, and manufactured from the plate gramophone records on all of which was a label stating: "This copyright patented record may not be sold below price (*sic*) fixed by the patentee, nor publicly performed." On February 14, 1933, the defendants bought one of the records, which on February 20 was played without the company's consent in one of their tea and coffee rooms. The company alleged that that was an infringement of the copyright which it claimed in the record by virtue of the Copyright Act, 1911, and in this action claimed an injunction restraining the defendants their servants and agents from infringing its copyright in the record by performing it otherwise than by way of private performance, and an injunction restraining them from infringing that copyright by permitting a place of entertainment to be used for the performance in public of the record for their private profit.

The defendants by their defence denied that the company was the owner, by virtue of the Copyright Act, 1911, or at all, of the copyright in the record or of the musical adaptation recorded on it, and denied also that what they had done constituted a public performance of the record. They further denied that they were restricted to using the record for private performance, and contended that they were entitled to use it for other purposes, including public performance. By the defence they contended also that the company was estopped from denying their right to play the record in public by reason of its having supplied the defendants with an electrically controlled gramophone with two loud speakers attached, for the performance of records in the tea and coffee rooms. This contention, however, was abandoned in Court, and also it was admitted that what the defendants had done constituted, for the purposes of this action, a public performance.

Hon. Sir Stafford Cripps K.C. and *Basil Drewe* for the company. This is a test action raising a point of considerable importance to the gramophone industry, and brought in order to establish the rights of the makers of gramophone records. One of the most profound changes ever made in copyright law was introduced by s. 19, sub-s. 1, of the Copyright Act, 1911, before which there existed no copyright whatever in gramophone records and similar contrivances. The making of the " plate " of a record (i.e., the " . . . . appliance by which records . . . . are . . . . made " within s. 35, sub-s. 1, of the Act) creates copyright in records made by the plate. The maker of the record (in the present case, the company) owns that copyright, is " . . . . deemed to be the author of the work . . . . " within s. 19, sub-s. 1, and therefore has the sole right of giving public performances of the record. All that goes with the sale of the record is the right of using it for private performance, and the obvious way to do that is to use it for domestic performance. There is no right to use it for public performance unless a licence to do so has been obtained from the owner of the copyright. In the present case the defendants have used the record for public performance without obtaining a licence from the company, and having done that—especially as it was drawn to their attention on the back of the record that they could not do it—they have infringed the company's copyright.

The sale of a record after the commencement of the Copyright Act, 1911, without the consent of or the payment of royalties to the composer of the musical work recorded, the record having been made before the commencement of the Act, was held to be an infringement of the composer's copyright. *Monckton* v. *Pathé Freres Pathephone, Ld.* (1) In *Thompson* v. *Warner Brothers Pictures, Ld.* (2), it was held that s. 19, sub-s. 7, para. (*c*), of the Copyright Act, 1911, reserved to the author of an original work who had assigned the copyright only the right to make or authorize the making of the record, and not the sole right to perform it in public. That case, however, is not analogous to the present case. In the present case the work recorded is in the public domain, and it is the company's right, not in the work itself, but in the record, that the defendants have infringed. In *Australasian Performing Right Association, Ld.* v. *3DB. Broadcasting Co. Pty., Ld.* (3), Lowe J., although he had not to decide the question which has to be decided here, indicated what considerations would, in his view, come before the Court should that question, or like questions, arise, and what he said supports the company's contentions in the present case. Broadcasting within the jurisdiction of the English Court any matter which is the subject of copyright without the consent of the owner of the copyright is an infringement of that copyright: see *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (4)

Fergus Morton K.C. and *F. E. Sugden* for the defendants. The defendants are calling no evidence and will not persist in the defence of estoppel which was raised in the pleadings. The proposition which they will seek to establish is that the only person who can restrain the public performance of a musical composition is the owner of the copyright in it.

(1) [1914] 1 K. B. 395.
(2) [1929] 2 Ch. 308.
(3) [1929] V. L. R. 107, 113, 114, 115.
(4) Ante p. 121.

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He has the sole right which is given by s. 1 of the Copyright Act, 1911. The owner of the record or other contrivance on which the composition is recorded has not that right, and in the case of works in the public domain there is no restriction on performance in public, whether by record or otherwise. Further, a record cannot be " performed " : to " perform a record " is a complete contradiction in terms. It is the work recorded that is performed : the record is used to perform it. The only right of the maker of a record is to prevent the reproduction of the record itself, not of the matter recorded. Actually to make other records from the record is to take advantage of the work which the maker has done and the trouble which he has taken, and is thus an infringement of his rights under s. 19 : but the maker has not the right to prevent the use of the record for the performance in public of the matter recorded. That can be prevented by the writer or composer of the matter recorded, and in the present case the composer is dead.

Hon. Sir Stafford Cripps K.C. in reply. It is true that the works of a living author or composer cannot be performed publicly without his consent. In cases where they have been recorded by any mechanical contrivance, leave publicly to perform the rendering of them so recorded must be obtained, not only from the author or composer, but from the makers of the contrivance. It is impossible to make a distinction between the performance of a record and the performance of the musical work recorded on it. The phrase " musical work " means a work of which some sort of record, whether it be a manuscript or a mechanical contrivance, has been made. It cannot refer to something which is merely carried in the head.

MAUGHAM J. In this action the company is claiming an injunction to restrain the defendants, who are persons carrying on business as proprietors of tea and coffee rooms at Bristol, from infringing the company's copyright in a gramophone record, catalogue No. D.A.1264, entitled " Overture to 'The Black Domino,' " by performing the record otherwise than by way of private performance, and another injunction substantially designed to have the same effect. The facts are simple and are not in dispute, and I am told that this case is in the nature of a test case of great importance to people interested in gramophone records. [His Lordship then stated the facts and continued :] The musical work in question being in the public domain, it is clear that any one may perform it in public and may publish it in print in the usual way. The question is whether the company is entitled to restrain, not the performance of the piece of music simpliciter, but the performance of it as played by the London Symphony Orchestra and recorded as I have mentioned. No question has been raised in reference to the word "plate," and I will assume that the word "plate" in para. 2 of the statement of claim, which is used in reference to the same word as contained in s. 19 of the Copyright Act, 1911, is appropriate to describe the cylinder of wax or other device which was used in the first instance for the purpose of subsequently making the record. It is not in dispute that skill, both of a technical and of a musical kind, is needed for the making of such a record as the one in question. The arrangement of the recording instruments in the building where the record is to be made, the building itself, the timing to fit the record, the production of the artistic effects, and, perhaps above all, the persons who play the instruments, not forgetting the conductor, combine together to make an artistic record, which is very far from the mere production of a piece of music. It is hardly necessary to say that the performance by such an orchestra as that which I have mentioned is widely different from a performance by street musicians or by the persons who give concerts on the sands at the seaside ; and what the company is seeking to protect is that particular record so far as concerns a performance in public from the record. It is not in dispute for the purposes, at any rate, of this action, that the performance by the defendants was in public. It is further common ground between the parties that the question whether the performance in public was an infringement of the company's rights depends on the effect of s. 19 of the Copyright Act,

1911. I am told that that section, which, to my mind, presents many difficulties not only on the point before me but on a number of other points, was the result of a compromise arrived at between various interested parties while the Bill which subsequently became the Copyright Act, 1911, was passing through the House of Commons. It is well known that under those circumstances difficulties are to be anticipated in construing such a section.

I will assume myself to have read in full the lengthy section which is s. 19 of the Copyright Act, 1911. (1) I will observe in the first place that the company is given a copyright in the record "in like manner as if the record was a musical work." It is also to be noted that it has a term of copyright of fifty years from the making of the original plate.

Sub-s. 1 of the section applies to records, perforated rolls, and other contrivances by means of which sound may be mechanically reproduced. It accordingly applies to literary, dramatic, and musical works. It is noticeable, however, that sub-s. 2 applies only to musical works and gives a right to all members of the public to make records of musical works on certain terms which I will not repeat. Obviously I think it is to be gathered from the section that a person who is authorized on terms under sub-s. 2, or who obtains authority from the owner of what I will call the original work to make a record, is intended to have a right, and is given a right, to sell the record so made, although there is nothing about this in the section. It is, however, not so clear whether any such person can use the record for a public performance. He can, of course, use it for a private performance, because a private performance, whether of a literary, dramatic or musical work, is not an infringement of copyright under any circumstances, since the copyright, as defined in the Act (see s. 1, sub-s. 2), means, with regard to performance, merely the right to perform the work in public.

The section I am considering, s. 19, throws no light on, and lays down no condition with regard to, the way in which records, perforated rolls, or other contrivances have come into existence. Using the word "record" as sufficient to cover for the purpose of brevity the phrase I have read, it is manifest that a record must be made from a literary, dramatic or musical work and it is clear that in such a work there may well be copyright under s. 1 of the Act. It is not difficult to make a record without the leave of the owner of the original copyright, for records are made in private, and I think it is a little surprising that there is nothing in s. 19, sub-s. 1, which says whether the record is assumed to be a record lawfully made. It does not seem to me at all clear that an answer to that question is to be found in the provisions of s. 7 of the Act, for the record itself is neither a copy of the original work nor is it itself, I think, a plate, although it is made from something which may be deemed to be a plate. For the purpose of the present case, however, I shall assume that the section gives protection only in respect of records lawfully made, which is the case with the record I am dealing with to-day.

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(1) Set out in the head-note at p. 450 ante.

Now, there are certain considerations which it is useful to bear in mind before coming to the short though difficult problem that I am asked to solve. In the first place I think it is worth pointing out that the special copyright given by s. 19, if it is a copyright in a record made with the consent of the owner of the original work, may subsist for many years after his copyright has come to an end. For example, it might be, to take an extreme case, that, during the last years of the subsistence of copyright in an opera, by the consent of the owner a record was made, and the term of copyright in the record would then last for fifty years from the making of the original plate from which the record was derived. This, I think, shows that the copyright conferred by s. 19 is not confined to cases where there subsists a copyright in the original work at the time when the record was made, and I do not think there is anything in the rest of the section which would lead to that restricted view. It is true that sub-s. 2 deals with cases where there is a copyright in the original work, but it must be observed that sub-s. 2 is purporting only to give what may be called a compulsory right to make a record without the consent of the owner of the original copyright, should there be one: and, as I have already pointed out, sub-s. 2 is confined to musical works, though sub-s. 1 extends to many other species of mechanical contrivances. It follows from this consideration that the records referred to in s. 19 may be records of a work which, to use the well known phrase, is in the public domain; secondly, they may be records made by the consent of the owner of the original work; and thirdly, they may be records of musical works made under the compulsory provisions of sub-s. 2.

The next point which I think is of importance is that sub-s. 1 gives no special right to the person who first makes a record of an original work. There may be, at least in a sense, two kinds of records of literary and dramatic works, those made with the consent of the original copyright owner, and those made after the original term of copyright has come to an end: and there may be, in the same sense, three classes of records of musical works, those made with consent, those made after the work is in the public domain, and, finally, those made under the compulsory provisions of sub-s. 2. Since there may be any number of records made under the provisions of sub-s. 2, it is evident that there may be numerous records of a musical work, each record being, under s. 19, one with its own term of copyright, and in each case the owner of what is called the original plate from which the record was made is to be deemed "the author of the work." In passing, I may mention that the word "work" there is certainly not very aptly used, since precisely the same word is used in sub-s. 2 to mean what I have called the original work. However, in sub-s. 1, since there may be many authors, it is reasonably clear, I think, that the work in that sub-section must mean the work so embodied in the record. There may thus be a number of so-called authors, or persons deemed to be authors, each of them having his own special rights in his own record. Beyond doubt, each has a right to sell his own special record, and the purchasers from him would have a right to use the same for a performance in private.

The question that then arises is this: what is the position of the owner of the copyright in the original work so far as regards a performance in public? Counsel for the company, not unnaturally, I think, in this case at any rate, argued that the right of the original owner as regards a performance in public was not interfered with by the existence of a copyright under s. 19. I think an admission of that kind was probably necessary for his purpose. In my opinion the admission was rightly made. I see no reason for thinking that the copyright in the original work is interfered with by the creation of a special copyright in what I have called for brevity a record, except to the extent to which that right has been derogated from by the express language of s. 19 or a necessary inference therefrom. Therefore in my opinion the original owner has under s. 1 of the Act the sole right of performing the work in public, and this includes the sole right of performing the work by any mechanical means, and the existence of what I have termed the special copyright under s. 19 does not derogate from this right of the original owner. If the contrary had been intended I should certainly have expected clear words in s. 19 to that effect, and they are not to be found.

Accordingly, my opinion is that while the original copyright subsists, its owner is entitled to restrain a performance in public by any of the persons who get the limited and, as I think, subordinate copyright under s. 19: and it follows, as was argued on behalf of the company, that the two kinds of copyright may co-exist for terms of years which, as I have pointed out, may vary widely. The conception of co-existing copyrights is a familiar one in copyright law. A number of instances could be given. I think the best analogy for the present purpose is that of an adaptation or a new arrangement of a musical work composed by some other person. The rights of the adapter are subordinate to the rights of the composer, who is entitled to an injunction to restrain the performance of the new arrangement of his musical work so long as his copyright is still subsisting. If authority is needed for that, the case of *Wood* v. *Boosey* (1) may be cited. Other examples of the same kind may be derived from the law in reference to translations and in reference to anthologies. I think I have already said that the rights conferred by s. 19 on the various persons who may have made records include a right to sell the records for the purpose of private performance. The necessary implication must be that the person who has a copyright in the record can sell the record, and a buyer is entitled to make the work audible in private circles, since that is not an infringement of any right.

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(1) (1868) L. R. 3 Q. B. 223.

Now comes the question that has to be determined in this case. Have the persons who have lawfully made records such a copyright under s. 19 as would entitle them to the exclusive right of performance in public of those particular records so that they are entitled to restrain the use of those records for public performances? In putting the question in this form I may point out that I am not considering the rights of the owner of the copyright in the original work, but I am assuming either that there is no such copyright or that the owner does not choose to intervene. I confess that I do not think the answer to the question is free from difficulty, having regard to the defective nature of the drafting of s. 19. The conclusion at which I have arrived is guided to some extent by the view I have expressed as to the co-existing copyrights in the original work and the special copyrights under s. 19. The words in the section "copyright shall subsist in records, perforated rolls, and other contrivances, ... in like manner as if such contrivances were musical works," are general in their form, and, apart from the rights of the original owner, can only, I think, be cut down by a reasonably clear context. The phrase is not, in my opinion, apt to describe a mere right to prevent the reproduction in a physical form of the record and a right to sell the record. The owner of the copyright in a musical work has the sole right to produce the work in public. It is, in my opinion, a reasonable construction that the owner of a special copyright under s. 19 in a record of which he is the owner has the sole right to use that record for a performance in public, provided that the overriding rights of the original owner do not intervene. On this view, each owner of each record of the work has a like right to use and to protect his record. Some weight ought to be attached, in my opinion, to the phrase "the person who was the owner of such original plate . . . . shall be deemed to be the author of the work." That, it seems to me, supports the same view: and I would add, without placing too much stress on such a consideration arising in a matter under the Copyright Act, 1911, that I see no injustice or unfairness which is likely to arise from my construction of the section. On the other hand, I can see considerable objection, from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance.

Three cases have been cited to me as having some bearing upon the question that I have to deal with. The first is a decision of the Court of Appeal in *Monckton* v. *Pathé Frères Pathephone, Ld.* (1) The question there was a question which arose with reference to the sale of certain records manufactured abroad by the defendants before the commencement of the Copyright Act, 1911, and imported into England, the sale being effected after the commencement of the Act, without the plaintiff's consent and without payment of royalties. It is manifest that that question is widely different from the question I have to determine here. I have carefully considered the judgments of Buckley and Kennedy L.JJ. Buckley L.J. approached, so to speak, the problem, but, after indicating its nature, he observed that the parties had declined to argue it as having any bearing on the case before him, and he therefore said no more about it, nor do I think there is anything in the rest of the judgments which really assists me in the present case.

The second case is that of *Thompson* v. *Warner Brothers Pictures, Ld.* (2) That case also went to the Court of Appeal, but the point to be decided, though indeed a point under s. 19, was, as I read the judgments, an extremely narrow question as to

(1) [1914] 1 K. B. 395, 405. (2) [1929] 2 Ch. 308.

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the construction of sub-s. 7, para. (*c*), of s. 19. That sub-section was, I may say, obviously designed to prevent the author of a musical work who had made an assignment before the passing of the Act being prejudiced by an assignment in general terms made at a time when the exclusive right to authorize the making of the records did not exist. The section accordingly provided that the newly conferred right should belong to the author notwithstanding that he had assigned his copyright in the musical work, and the only question, as I read the case, was whether anything more was reserved to the author than was expressly mentioned in sub-s. 7, para. (*c*). The Court of Appeal, for reasons which seemed good to them, came to the conclusion that there was no ground for giving to sub-s. 7, para. (*c*), any wider construction than the natural meaning of the words, and accordingly the only thing that was reserved to the author was the sole right to make or authorize the making of a record, and the sub-section did not reserve to him the sole right to use a record for public performance.

There are, no doubt, certain phrases in the judgments which might seem to indicate that the learned Lords Justices were taking a view not unfavourable to the view presented on behalf of the defendants here. I can, however, find nothing at all definite as a guidance to me, and I have thought it right to express my own view on the construction of the Act.

There was lastly cited to me a judgment in an Australian case, *Australasian Performing Right Association, Ld.* v. 3*DB. Broadcasting Co.* (1) It came before Lowe J. in the Supreme Court of Victoria on March 20, 1929. There again the question to be determined was not the question which I have to decide here, but it is true that Lowe J. indicated a view on that question, and I will only say that I am glad to find that his conclusion upon the matter and, to some extent at least, the ground for his conclusion coincide with those which I have expressed.

Accordingly the action will succeed, and there will be a suitable declaration or, if desired, an injunction.

Solicitors: *Broad & Son; Hall, Brydon & Chapman.*

K. R. A. H.

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(1) [1929] V. L. R. 107, 113, 114, 115.

TOWNEND *v.* ASKERN COAL AND IRON COMPANY.

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Jan. 16, 17, 23; *Feb.* 6.

[1932. T. 2214.]

Mine—Coal Mine—Working facilities—Application to Canal Commissioners to work mine under adjoining land—Application granted—" Every dispute concerning any matter or thing whatsoever arising out of this Order shall be referred to the Commission "—Action by Owners of adjoining land for damages in respect of subsidence of premises subsequent to Order of Commission—Jurisdiction of Court not ousted by Order of Commission—Trespass—Working under adjoining land after application made to Commission, but before Order made—Not wilful Trespass—Measure of damages—Mines (Working Facilities and Support) Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 20)*—Mining Industry Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 28).

A mining company, for the proper working of its mines, obtained an order from the Railway and Canal Commission under the Mines (Working Facilities and Support) Act, 1923, and the Mining Industry Act, 1926, granting it facilities to work the coal under land adjoining its mines upon the terms and conditions therein stated. One of the paragraphs in the order was in these terms: " Every dispute concerning any matter or thing whatsoever arising out of this Order shall be referred to the Commission." The owners of the land brought an action for injury done to their property by a subsidence which took place subsequent to the date of the order. The Company took the preliminary objection that the action was not maintainable, and that the questions in dispute were wholly questions to be determined by the Commission, and not by the High Court:—

Held, that the Railway and Canal Commission has no jurisdiction enabling it to oust the jurisdiction of the High Court, but the effect of an order made by that Commission, under the above-mentioned Acts, may be to make not actionable an act or acts which apart from the order would have been tortious and, in this way, to deprive a plaintiff of a cause of action which he would otherwise have had, or it may affect the relief to which the plaintiff would otherwise have been entitled.

A mining company, for the proper working of its mines and having made an application to the Railway and Canal Commission for an order, under the above-mentioned Acts, giving it facilities to work minerals under adjoining land together with ancillary rights of working including that of letting down the surface on payment of compensation, committed a trespass by working under adjoining property before the order was granted but after the application was filed. An action was brought by the owners of the adjoining land for damages for trespass for working the coal without an order of the Commission so to do:—

Held that, in the circumstances, the trespass was not wilful and that the plaintiffs were entitled only to reasonable damages and not to penal damages, the company being allowed all expenses of hewing and raising.

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WITNESS ACTION.

The plaintiffs were the owners in fee simple of a small piece of land in the town of Askern, in the county of York, upon which there were two messuages. The defendants were a colliery company, and they had acquired mining rights over a considerable area in the immediate vicinity of the plaintiffs' land, but before January, 1928, they had no right over the plaintiffs' land, or over certain other small plots of land in the neighbouring district. In 1927 the defendants, thinking it necessary for the proper working of the coal in the area in which they had mining rights to acquire the right to the coal in the adjoining pieces of land in which they had no such rights, made an application to the Board of Trade in pursuance of the provisions of the Mines (Working Facilities and Support) Acts, 1923, and Mining Industry Act, 1926, for leave to work those minerals and to let down the surface of those pieces of land including that belonging to the plaintiffs. That application was dated January 19, 1927, and there was annexed to it a map showing the area in question in which those pieces of land over which they desired to obtain these rights were coloured red. The plots of land so coloured included the plaintiffs' property. That application was, in pursuance of the power given to the Board of Trade by the above mentioned Acts, referred to the Railway and Canal Commission for consideration and decision. On February 21, 1927, an order was made by the Railway and Canal Commission that notice of the application should be given by advertisement and otherwise. That order was duly complied with, but the plaintiffs said that it was not brought to their attention and they did not in fact appear before the Commission. The matter came before the Railway and Canal Commission on more than one occasion before the order was made, and in the meantime, while the matter was still pending, that is in the early part of the year 1927, the defendants entered upon the plaintiffs' land and removed certain of the coal therefrom without the knowledge or consent of the plaintiffs. This working of the minerals by the defendants was shown on another map which was before the

Commission at the final hearing, but the attention of the Commission was not especially called to that fact. On January 11, 1928, the Railway and Canal Commission made the order by which the facilities sought by the defendants were granted to them upon the terms and conditions therein stated. The relevant parts of the order are as follows. It began : " Upon hearing Counsel for the Applicants and the Solicitors for the Objectors . . . . and the Commission being of opinion that it is expedient in the national interest that the rights applied for by the Applicants should be granted to them. It is ordered that the Applicants be granted the right to work the minerals and other the rights specified in the Schedule hereto so far as they are not already vested in the Applicants or otherwise exercisable by them subject to and in accordance with the terms and conditions and for the period therein mentioned. Liberty for the Applicants, the Objectors, and all owners of surface or mineral rights in the area specified in the Schedule hereto to apply as they may be advised. The Commission may review and rescind or vary this Order." The last provision was in accordance with the Acts which gave the Commission power at any time to rescind or vary an order made by them. Then in the Schedule of terms and conditions, para. 1, stated the minerals and the property which was referred to in the order. Para. 2 provided : " The method of working is to be by underground workings only, and by means of the longwall method or other the most approved method or system of working in the district." Then para. 3 (i) provided : " The Applicants shall be at liberty to let down the surface of the described lands including superincumbent and adjacent strata up to and including the surface, on condition that (*a*) they make good or pay compensation as hereinafter set out for all actual damage (including temporary and permanent damage if any by flooding) caused by their workings of the minerals to the said surface of the described lands and to existing and future buildings works and things erected constructed or anything growing thereon " and (iii) : " For the purpose of making good any such damage and in order to avoid or minimise any such damage, the

Applicants shall be at liberty at any time after reasonable notice given to the owners thereof, to enter upon the surface of any of the lands affected by this Order, and to repair and raise the banks of any drains or dykes and to bolt and strap any building or place struts against the same or otherwise strengthen or reinforce the same or carry out such other works or repairs as may be in their opinion necessary or advisable." Then para. 6 provided: "The consideration to be paid by the Applicants for coal worked and gotten by them from under the described lands in pursuance of this Order" . . . . and the right was therein stated. Para. 7 provided: "The said consideration shall be paid by the Applicants into the Court of the Railway and Canal Commission within one month of the first day of July in each year during the operation of this Order." Then the applicants were to furnish to the Registrar a return of all persons believed to be respectively entitled. Para. 11 provided the period during which the order was to be in operation: "The term during which the Applicants may work the minerals and exercise the said ancillary rights shall expire on the 31st of December, 2003." Para. 16 provided that: "Subject as herein mentioned in case any damage shall be caused to the described lands, or any buildings works or constructions for the time being thereon, by reason or in consequence of the working and getting of the minerals hereby authorised to be worked, or otherwise howsoever in connection with the exercise of the rights granted by this Order, and if the Applicants shall have failed for six months after receiving notice of such damage to make good the same, then and in such case compensation shall be payable by the Applicants as provided by para. 3 hereof, but mere subsidence without actual damage shall not give rise to a claim for compensation." And finally, para. 22 was in these terms: "Every dispute concerning any matter or thing whatsoever arising out of this Order shall be referred to the Commission."

In July of 1928 the fact that the order had been made was brought to the attention of the plaintiffs by the defendants, and in August of 1928 the plaintiffs complained to the

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defendants that damage had been caused to their property by subsidence, and as a result of those complaints the architects for the respective parties met from time to time, and certain repairs were done by the defendants to the plaintiffs' property; but the plaintiffs being dissatisfied, commenced this action on December 10, 1932, claiming damages both for the trespass committed by the defendants in 1927 before the order was made, and for the injury done to their properties by subsidence, which first manifested itself in 1928 after the order had been made. In February, 1929, one of the plaintiffs received from the Registrar of the Railway and Canal Commission a sum of 6*l.* 10*s.*, which had been paid into Court by the defendants for the royalties payable under the order, but on March 7, 1933, that sum was repaid to the Registrar on the ground that it had been paid under a mistake of fact. The defendants both in their defence and at the Bar pleaded that having regard to the above mentioned matters, including especially para. 22 of the order of the Railway and Canal Commission, the action was not maintainable, and that the questions in dispute were wholly questions to be determined by that Commission, and not by the Court. Upon this contention being raised his Lordship directed that it should be treated as a preliminary objection and disposed of before proceeding further with the trial.

The following provisions of the Mines (Working Facilities and Support) Act, 1923, are of importance. Sect. 1, sub-s. 1: "Where there is danger of minerals being left permanently unworked . . . . (*b*) by reason of the minerals being owned in such small parcels that they cannot be properly or conveniently worked by themselves; a right to work the minerals may be conferred in the manner and subject to the provisions hereinafter appearing on any person having an interest in them, or, in the case of minerals owned in small parcels, in minerals adjacent to them, who is desirous of working them either by himself or through his lessees." Sect. 3, sub-s. 1: "Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred in the manner and subject to the provisions hereinafter appearing on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees." Sub-s. 2: "In particular, but without prejudice to the generality of the foregoing provision, such ancillary rights shall include—(*a*) a right to let down the surface." Sect. 4: "Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons," and there are various reasons given. Sect. 5: "Any person having an interest in any minerals who is desirous of working, either by himself or through a lessee, those minerals, or any adjacent minerals, and who considers that the circumstances are such that a right to work the minerals can be granted under this Part of this Act, may send to the Board of Trade an application for the grant of such a right." By sub-s. 4 the Board is given power to refer the matter to the Railway and Canal Commission. Then in s. 9 there is provision for the right for compensation to be provided by the Commission. Sect. 11: "A right granted under this Part of this Act shall not confer on the person to whom it is granted any greater or other power than if the right had been granted by a person legally entitled to grant the right, or relieve the grantee from any obligation or liability to which he would have been subject had the right been granted by such a person." Sect. 14, which is the interpretation clause, defines what is meant by "minerals," "surface" and "The right to let down the surface."

Gordon Bamber for the plaintiffs. The order of January 11, 1928, cannot oust the jurisdiction of the Court or deprive the plaintiffs of any of their common law rights: see judgment of Lord Hanworth M.R. in *Glassbrook Brothers, Ld.* v. *Leyson.*(1)

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(1) [1933] 2 K. B. 91, 103 et seq.

[FARWELL J. There are two questions that may be distinct: (1.) the claim in respect of damage done by subsidence after the order was made; (2.) the claim in respect of trespass committed in 1927 before the order was made. I fail to see how the order can be effective in respect to the claim for trespass.]

Under s. 3 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), it was reserved to the Court of Common Pleas to hear any matter of complaint that arose under the Act. Sect. 2 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), which establishes the Railway and Canal Commission, does not make it a branch of the High Court. Sub-s. 5 of s. 5 makes it quite plain that when a judge is sitting as an ex-officio Commissioner he is not acting as a judge of a superior court. By s. 8 the jurisdiction of the Railway Commissioners was vested in the present Commissioners. Sect. 12 gives the Commissioners power to award damages. Sect. 17, sub-s. 1, provided that no appeal should lie from the Commissioners upon a question of fact, but the Court of Appeal held in *Glassbrook Brothers, Ld.* v. *Leyson* (1) that, notwithstanding sub-s. 1, an appeal lay in that case. There is nothing in the rules made under the Acts that enables the Commissioners to make an order in the form of para. 22 of the Schedule to the order of January 11, 1928. *Barry Ry. Co.* v. *Taff Vale Ry. Co.* (2) is a decision that the jurisdiction of the High Court cannot be ousted.

Rabagliati for the defendants. The judgment of Lord Hanworth M.R. in *Glassbrook Brothers, Ld.* v. *Leyson* (1) has no application to this case. Sect. 4 of the Railway and Canal Traffic Act, 1873 (36 & 37 Vict. c. 48), provided for the appointment of Commissioners under the Act. Sect. 6 transferred to the Commissioners all the powers which had been given to the judges of the Common Pleas by the Act of 1854. The sole power left to the judges of the Common Pleas was to enforce the orders of the Commissioners. Under the Act of 1888 the Commissioners have all the powers of the judges of the High Court. There is nothing to prevent the

(1) [1933] 2 K. B. 91.

(2) [1895] 1 Ch. 128.

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Commissioners making an order in the form of para. 22 of the Schedule to the order of January 11, 1928, or from saying that they would keep the proceedings in their own hands. The decision in *Barry Ry. Co.* v. *Taff Vale Ry. Co.* (1) applied only to the particular circumstances of that case and has no application to this case. The trespass committed in 1927 was a matter arising out of the dispute on which the order was made.

Cur. adv. vult.

1934. Jan. 23. FARWELL J. It has been contended on behalf of the plaintiffs that this action is maintainable because the Railway and Canal Commission have no power to oust the jurisdiction of the Court and that it is open to the plaintiffs to bring this action if they so desire instead of applying to the Railway and Canal Commission for relief. The contention that the Railway and Canal Commission has no power to oust the jurisdiction of the Court is, in my judgment, well founded. It is a fundamental principle of our law that a person who has suffered a legal wrong has a right to seek redress in the Courts, and he cannot be deprived of that right except by Parliament, and I can find nothing in any of the Acts relating to the Railway and Canal Commission which gives it such power. This, however, by no means concludes the matter. Although the Railway and Canal Commission have no power, in my judgment, to prevent an action being brought in these Courts in any case where a person has a good cause of action, the effect of the order made by that Commission may be to make not actionable an act or acts which apart from such order would have been tortious, and, in this way, deprive the person of a cause of action which he would otherwise have had, or may affect the relief to which the plaintiff, who has a good cause of action, would otherwise have been entitled. Applying these considerations to the present case, the position appears to me to be as follows: in 1927, before the order was made, the plaintiffs had a good cause of action against the defendants for trespass, and if they had brought their action then they would have recovered damages, and since in an action for trespass damages must be recovered once and for all, the damages to which they would have been entitled might have included a sum for depreciation of the value of their property if they could have proved that the possibility of damage from subsidence at some future date had been increased by the removal of a portion of their coal. They did not, however, bring their action at once, and before doing so two events had occurred: first, in order of time, the order of the Railway and Canal Commission had been made, and secondly subsequently damage had actually been done to the plaintiffs' property by subsidence. The effect of that order was not to deprive the plaintiffs of their right to maintain an action for trespass committed before the date of the order, and notwithstanding the order they are still entitled to recover as damages the value of the coal wrongfully abstracted. The order of the Commission can in no way affect this, since the right to work the plaintiffs' coal given by that order to the defendants in consideration of the royalties thereby made payable can only apply to coal which was there to be worked at the date of the order. That order, however, in my judgment, has deprived the plaintiffs of any right to recover damages for the injury done by subsidence. Had that order never been made and the action for trespass brought after the damage had been done, the plaintiffs would have been entitled in that action to damages for such injury, if any, as they could have proved was due to the wrongful abstraction of coal in 1927. Before such action was brought, or the damage had occurred, the defendants had by the order been relieved from all obligation to prevent subsidence and consequently the plaintiffs had ceased, before action brought, to have any right to recover damages on that head. The effect of the order is at least no less than if the plaintiffs had agreed before action brought, in consideration of compensation payable by the defendants, to give the defendants the right to let down the surface: see s. 11 of the Act—and such an agreement would, in my opinion, have precluded the plaintiffs from recovering damages from the

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(1) [1895] 1 Ch. 128.

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defendants for injury from subsidence after the date of the agreement. So far, therefore, as this action is an action for trespass, it is still maintainable although the damages now recoverable will not include damage for subsidence. The plaintiffs' only remedy for this injury is to obtain compensation in the Railway and Canal Commission.

So far I have dealt with this action solely as an action for trespass committed in 1927. The plaintiffs, however, also claim damages for subsidence due to the removal of support from adjoining lands in which the defendants had the right to work. It is now well settled that in such a case there is no cause of action until damage has actually been done, and since in this case no damage occurred until after the date of the order it must follow that the plaintiffs had no cause of action in respect of these matters since, prior to the time at which they would otherwise have had a cause of action, the defendants have been relieved from liability in this respect by the order of the Commission.

In the result this action, so far as it is an action for damages for subsidence by removal of support from the adjoining property, is not maintainable and must be dismissed. So far as it is an action for damages for the trespass in 1927, it is maintainable and must proceed, but the damages recoverable will not include any sum in respect of subsidence.

Feb. 6. The question of the trespass committed in 1927 now came before the Court, the point at issue being the measure of damages.

Gordon Bamber for the plaintiffs. *Trotter* v. *Maclean* (1) deals very fully with the method of compensation in coal mines cases, but the first part of the decision does not apply here. This is a case of wilful trespass, done without the knowledge of the plaintiffs, and the defendants should only be allowed the cost of bringing the minerals to bank, as in the second part of the decision in *Trotter* v. *Maclean.* (1) The judgments of Lord James of Hereford in *Bulli Coal Mining Co.* v. *Osborne* (2) and Lord Hatherley in *Livingstone*

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(1) (1879) 13 Ch. D. 574.

(2) [1899] A. C. 351, 362.

v. *Rawyards Coal Co.* (1) show clearly that the plaintiffs should be given damages on the highest scale.

Rabagliati for the defendants. The defendants anticipated an order by the Railway and Land Commissioners, which in fact was given. It is not, therefore, a case of wilful damage. Moreover, the non-removal of the coal would have been against the proper working of the mine. In *Jegon* v. *Vivian* (2) damages were assessed on a royalty basis, all expenses of hewing and raising being allowed. That principle was followed in *Livingstone* v. *Rawyards Coal Co.* (3)

Bamber replied.

FARWELL J. It is unnecessary for me at this stage of these proceedings to recapitulate the facts relating to this action, because I have stated them in the judgment which I have already given.

On the basis of that judgment the only question left in this action is the amount of damages which the defendants must pay to the plaintiffs for the trespass in working and removing the coal in the plaintiffs' property before the order in the Railway and Canal Commission Court was made. The real difficulty in this case is to determine the basis upon which those damages should be assessed. It is said on behalf of the plaintiffs that this is a case of a wilful trespass, a trespass done without the knowledge of the plaintiffs, and with full knowledge by the defendants that they were taking somebody else's property, and that they therefore committed a fraudulent trespass within the meaning of the term as used in many of the cases and one which entitles the plaintiffs to damages on the highest scale given in this class of case—namely, on the basis of treating the coal as a chattel, without deducting the cost of getting it, of severing it from the freehold and bringing it to the surface. On the other hand it is said that although the defendants knew and must be taken to have known that the coal was not their property, and that they had not got the consent of the plaintiffs to work the

(1) (1880) 5 App. Cas. 25, 34.
(2) (1871) L. R. 6 Ch. 742.
(3) 5 App. Cas. 25.

coal, in the circumstances they should not be treated as fraudulent trespassers, but having regard to the fact that there was an application at that time pending before the Railway and Canal Commission which resulted in their obtaining the right to work this coal upon a royalty basis, they should be treated as on the same footing as the defendants were treated in *Trotter* v. *Maclean* (1), that is to say, as inadvertent trespassers which would entitle the plaintiffs to the value of the coal after deducting the costs of getting it and bringing it to the surface.

In *Trotter* v. *Maclean* (1), which is a decision of Fry J., the facts as stated in the head-note were that " the owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the bona fide belief that he was about to obtain from them a contract authorizing him so to work, and gave to one of the trustees notice that he was about to commence working :—*Held*, that the working, though no contract was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, and in taking an account of the minerals gotten without authority the defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to the defendant that no contract would be made with him authorizing him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank."

Now, it is said that in this case I ought to treat the defendants in the same way as the defendants in that case were treated before the notice had been given. Here the area of the plaintiffs' land was extremely small. The total amount of coal extracted from it was 810 tons. The application before the Railway and Canal Commission had actually been made and was pending in March of 1927, but had not been heard and disposed of, and at that date the defendants had worked up to the plaintiffs' property and they were faced with the difficulty, according to the evidence which I have heard, that either they must leave some considerable area unworked or they must go on and work the coal, including the plaintiffs' coal. If they had left the plaintiffs' coal with no other coal at all in the immediate area, according to the evidence which the defendants have called, which I accept, it would have resulted in a very serious risk of fire, and it would not have been, from a mining point of view, a course which could properly be adopted. On the other hand, had they left a sufficiently large amount of coal it would, according to their evidence, have rendered it unprofitable to go on working that district at all, which would have meant that the workings would have been shut down and a considerable number of men thrown out of employment. They were faced with that difficulty, and in considering the position it is not without significance to bear in mind that the coal belonging to the plaintiffs could not have been worked by themselves at a profit, and from that point of view was worthless and that there was nobody to whom the plaintiffs could dispose of the coal except the defendants. Having regard to those circumstances I think that I am entitled in this case to treat the defendants in the way in which the defendants were treated in *Trotter* v. *Maclean* (1) before they knew that no lease would be granted.

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(1) 13 Ch. D. 574.

There is this distinction between the two cases, and it is impossible to overlook it, that in *Trotter* v. *Maclean* (1) one of the trustees was told that the defendants were about to commence working, and he did not object. Here there was no notice given to the plaintiffs, in fact at that date the defendants did not know who the owner or owners of the particular property were, and in that regard this case differs from that of *Trotter* v. *Maclean* (1); but notwithstanding that, taking all the circumstances into consideration and having regard to the fact that the defendants were making an application to the Commission which shortly afterwards was successful, so that they obtained the right to work the coal, I think that it would be wrong to treat them as fraudulent trespassers, and make them liable for damage on the higher scale.

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(1) 13 Ch. D. 574.

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Having regard to the decision in *Livingstone* v. *Rawyards Coal Co.* (1), I think that the proper method of arriving at the damage payable to the plaintiffs in this case is to consider the royalties which would have been payable in the circumstances. On the evidence before me I have come to the conclusion that the sum to which the plaintiffs are entitled for damages in this case is the sum of 10*l.*

With regard to the costs of the action the order will be: judgment for the plaintiffs for the sum of 10*l.* on the issue as to damages for trespass, with costs of that issue to be taxed on the county court scale. Except on that issue the action fails and the defendants are entitled to the costs and there will be the usual set-off. The defendants have paid various sums of money into Court, and I think that in the circumstances the appropriate order to make will be that the money paid into Court be paid out to the defendants.

Solicitors for the plaintiffs: *Kenneth Brown, Baker, Baker, for H. E. Harrowell & Brown, York.*

Solicitors for defendants: *B. A. Woolf & Co.*

(1) 5 App. Cas. 25.

P. J. B.

CLAUSON J.
1934
March 6.

In re GARRETT.

CROFT *v.* RUCK.

[1933. G. 1528.]

Infant—Advancement—Construction—Interest contingent on double event—Survivorship and attainment of specified age—Consents to exercise by trustees of statutory Power—Effect of restraint on anticipation on power to consent—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32, 69, *sub-s.* 2.

Under the trusts of the will of a testator who died in 1930, an infant was entitled, subject to the life interests of the testator's widow and the infant's mother who was restrained from anticipation, to a share in the testator's residuary estate contingently upon surviving her mother and attaining the age of twenty-one years.

By s. 32 of the Trustee Act, 1925, trustees are empowered, with the consent of any person entitled to any prior life or other interest who might be prejudiced thereby, to advance capital money to any person entitled to a share in the capital of the trust property, whether absolutely or "contingently on his attaining any specified age or on the occurrence of any other event."

Upon a summons by the mother (a married woman) of the infant asking that the trustees might be authorized under s. 32 of the Trustee Act, 1925, with the consent of the plaintiff and of the testator's widow to raise and pay out of the capital of the contingent share of the infant in the residuary estate of the testator certain sums for school fees and other incidental expenses:—

Held, first, that upon the proper construction of the will and s. 32 of the Trustee Act, 1925, the alternative contingency therein mentioned of "the occurrence of some other event" is not restricted to the occurrence of an event having no reference to a specified age, but, while excluding the single event of attaining a specified age, included the compound or double event of attaining a specified age and survivorship and that, accordingly, the power of advancement conferred upon trustees by that section was (subject to the provisoes in that section contained) available in respect of the interest of the infant in the residuary estate of the testator, and secondly, that notwithstanding the restraint on anticipation imposed by the will on the interest of the mother of the infant, she was capable of giving a valid consent to the exercise of such power, within the meaning of the proviso (*c*) to s. 32, sub-s. 1, of the Act.

ADJOURNED SUMMONS.

William Henry Garrett by his will dated May 18, 1929, bequeathed his residuary estate to trustees upon trust out of the income thereof to pay certain annuities to his wife, his daughter Edith Dorothy and his son Reginald and subject thereto to divide the balance of the income in equal shares between his said daughter and son And after the death of his (the testator's) wife to pay the income in equal shares to his said daughter and son for their respective lives without power of anticipation And after the death of his said daughter upon trust as to a certain share in the capital of his residuary estate for all and every her child or children living at her death who being sons or a son had attained or should attain the age of twenty-one years or being daughters or a daughter had attained or should attain that age or previously marry and if more than one in equal shares And after the death of his said son as to another share in the capital of his residuary estate upon similar trusts in favour of the child or children of his said son to those declared concerning the share of his said daughter after her death.

The testator's daughter Edith Dorothy married in 1917 Edwin Packer, and of their marriage, on July 9, 1918, the infant defendant Lesley Desiree W. Packer was born. In July, 1925, Mrs. Packer obtained a decree of divorce against her said husband, and on April 24, 1928, she married Leonard Croft. In the event of Mrs. Croft having no child who should attain a vested interest in her settled share, that share would be undisposed of by the testator's will.

By the summons which was taken out by Mrs. Croft it was asked first, that the trustees of the will might be authorized under s. 32 of the Trustee Act, 1925 (1), with the consents of the plaintiff and the testator's widow to raise and pay out of the capital of the contingent share of the infant Lesley

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(1) Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, ...

Provided that . . . . (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied, unless such person is in existence and of full age and consents in writing to such payment or application."

Packer in the residuary estate of the testator to which she was entitled in remainder expectant on the death of her mother, certain sums for her school fees and other incidental expenses; secondly, whether the consent thereto of the said Reginald Garrett must be obtained; and lastly, that, notwithstanding the restraint against anticipation on the plaintiff's interest in the residuary estate, the Court might, if necessary, pursuant to s. 169 of the Law of Property Act, 1925, declare that it was for the benefit of the plaintiff to consent to the application.

M. G. Hewins for the plaintiff. The language of s. 32 is in the widest terms. Upon the proper construction of the section, the "other event" referred to in the alternative contingency mentioned in sub-s. 1 is not restricted to a single event, but may include a compound or double event. While it is true that the "other event," if a single one, obviously cannot be the attainment of a specified age, there seems to be no reason why it should not include the compound or double event of the attainment of a specified age and survivorship. Here the infant is entitled contingently upon the occurrence of the compound event of attaining the age of twenty-one years and surviving her mother. According to s. 1, sub-s. 1 (*b*), of the Interpretation Act, 1889, the word "event" in the phrase "upon the occurrence of any other event" may include the word "events" in the plural. The statutory power of advancement conferred by the Trustee Act, 1925, must be treated as incorporated in the will: Trustee Act, 1925, s. 69, sub-s. 2 (1), and *In re Moody*. (2) If this power is to be so treated, the power of consenting given to persons having prior interests must also be treated as effective, notwithstanding the restraint against anticipation.

G. D. Johnston for the trustees, drew the attention of the

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(1) Sect. 69, sub-s. 2: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

(2) [1895] 1 Ch. 101.

Court to the cases of *In re Hodgson* (1) and *In re Stimpson's Trusts* (2) in reference to the question whether the plaintiff had, notwithstanding the restraint against anticipation, power to give her consent to the advancement, as required by s. 32. In *In re Hodgson* (1) it was held that a husband who took a protected life interest under a settlement did not, by releasing his life interest in the sums advanced under a power of advancement, forfeit his life interest thereunder. The forfeiture clause was never intended to operate so as to prevent the tenant for life consenting to the advancement. *In re Stimpson's Trusts* (2) was a case in which the tenant for life's interest was protected against assignment, and it was held that by giving his consent to an advancement under s. 32 of the Trustee Act, 1925, he forfeited his life interest; but it did not appear from the report of that case that *In re Hodgson* (1) was drawn to the attention of the Court.

J. V. Nesbitt for the infant Lesley Packer, adopted the argument of counsel for the plaintiff.

Charles Harman for Reginald Garrett. The events upon the occurrence of which the interest of the infant is contingent are strictly alternative events. The " event " in the phrase " the occurrence of any other event " must be read in the singular number and not in the plural. If the word can include a compound event, the compound event cannot include the event of the attainment of a specified age, because what is contemplated is some " other " event, which can only mean an event other than the event of attaining a specified age. The exercise of the power conferred by s. 32 is, by virtue of proviso sub-s. 1 (*c*), without prejudice to prior interests of the plaintiff, who is incapable (except by an order of the Court) of giving her consent by reason of the restraint on anticipation of her interest.

J. F. Bowyer for the testator's widow, adopted the argument of counsel for the plaintiff.

CLAUSON J. By his will the testator William Henry Garrett bequeathed his residuary estate upon trust to pay the income in various proportions between his widow, his daughter Mrs. Croft (the plaintiff), and his son Reginald Garrett during their respective lives, Mrs. Croft being restrained from anticipation. Upon the death of Mrs. Croft a certain share in the capital is settled by the will in trust for any child or children of Mrs. Croft who should survive her and should attain the age of twenty-one years. Accordingly, the infant, Lesley Packer, a child of Mrs. Croft by her former marriage with Mr. Edwin Packer, is entitled to an interest in the capital of a share of the trust property subject to the double contingency of surviving Mrs. Croft her mother and attaining the age of twenty-one years.

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(1) [1913] 1 Ch. 34.

(2) [1931] 2 Ch. 77.

The main question is whether, having regard to the contingent events mentioned in the will upon the happening of which the interest of the infant is made to depend, the trustees of the will have power, upon the true construction of the will and s. 32 of the Trustee Act, 1925, to raise and pay out of the capital of the share to which the infant is so contingently entitled certain sums for advancement.

By s. 43 of the Conveyancing and Law of Property Act, 1881, powers of maintenance were given to trustees in terms somewhat similar to the terms used in s. 32 of the Trustee Act, 1925; but, so far as I am aware, s. 32 is the first instance in which the legislature has seen fit to introduce into trust instruments a power for the trustees to make advances for the infant's benefit out of the capital of the share to which an infant is contingently entitled. The section is framed in the widest terms and reads as follows. [His Lordship then read the section and continued :] The new powers which the section confers upon trustees are in addition to the powers contained in the trust instrument: see s. 69 of the Trustee Act, 1925. It has been argued by counsel for the defendant Reginald Garrett that the word "event" in the sentence "on the occurrence of any other event," being in the singular number ought not to be so construed as to include a double or compound event and that, even if it can be so construed, the event of attaining a specified age is altogether excluded by the use of the words "other event" and, therefore, cannot form part of a compound event. That may be a possible construction, but it is not a construction that I ought to adopt. The legislature in enacting s. 32 intended to enlarge the powers of trustees and, in my view, it will be in accordance with a more natural reading of the section to construe the words "other event" as meaning an event other than the mere single event of attaining a specified age and as not excluding the compound event of the attainment of a specified age and survivorship by an infant.

The plaintiff, Mrs. Croft, who is a person entitled to a prior interest in the money proposed to be paid and who may be prejudiced by the advance being made, but whose consent to the advance may be given under sub-s. 1 (*c*) of s. 32, is a married woman restrained from anticipation. It has been suggested that, owing to that restraint, she is incapable of giving her consent under the section. As has been pointed out, the powers given by the section have effect subject to the terms of the instrument creating the trust: see s. 69, sub-s. 2, of the Trustee Act, 1925; and one of the terms of the will is that Mrs. Croft shall not anticipate the income of the share in question. But, in my judgment, Mrs. Croft has, notwithstanding the restraint, power to give her consent to the exercise by the trustees of their power of advancement under the section. That power must be taken to be incorporated in and read as part of the will and Mrs. Croft's power of consenting is not, in my view, inconsistent with the restraint against anticipation imposed by the will. Further, it is to be observed that in this will there is no forfeiture clause, the presence of which might well make a difference and introduce matter for consideration.

The question whether the consent of the defendant Reginald Garrett is necessary must depend upon whether in fact his prior interest will be prejudiced by the advancement proposed to be made. I can give no decision upon that question until I know whether his interest will be prejudiced. In every case the answer to such a question must depend upon the facts. I will make a declaration that upon the proper construction of the testator's will and s. 32 of the Act, the power of advancement thereby conferred upon the trustees of the will is (subject to the provisoes in that section contained) available in respect of the interest of the infant Lesley Packer in the residuary estate of the testator: and further that, notwithstanding the restraint on anticipation imposed by the will on the interest of the plaintiff, Mrs. Croft, she is capable of giving a valid consent in writing to the exercise of such power within the meaning of the proviso sub-s. 1 (*c*) of s. 32. Subject to this declaration the summons will be referred back to Chambers.

Solicitors: *Culross & Co.; Stannard, Bosanquet & Michaelson; Gery & Brooks; E. C. Rawlings, Butt & Bowyer; Marsden, Burnett & Davy.*

H. C. H.

In re ALLEN, CRAIG AND COMPANY (LONDON), LIMITED.

BENNETT J.
1934
March 7, 8, 9, 12, 13, 14, 15.

[No. 00514. 1933.]

Company—Auditors' report—How presented to members—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 134, *sub-s.* 1.

The duty of the auditors of a company to make a report to the members, under s. 134, sub-s 1, of the Companies Act, 1929, is confined to forwarding their report to the secretary of the company.

SUMMONS.

In the course of the hearing of a misfeasance summons (the facts of which, except those herein mentioned, are not material for the purposes of this report) it was alleged that the auditors of a company had prepared their reports on the accounts and balance sheets for the years ending June 30, 1925, and June 30, 1926, and had forwarded them to the secretary of the company without taking any other steps to present them to the members of the company. The question for the decision of the Court was whether the auditors had by so doing complied with the material provisions of the Companies Acts.

By s. 134, sub-s. 1, of the Companies Act, 1929, the following provision set out in s. 113 of the Companies (Consolidation) Act, 1908, is re-enacted : " The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office . . . ."

Harold Christie K.C. and *J. G. Strangman* for the applicant, the liquidator of the company. The report must be made to the shareholders. Dealings with shareholders collectively may be made with those assembled in general meeting. The provisions of the statute are sufficiently complied with in the present case if the report is made at the general meeting. A communication to the members assembled at a general meeting is a communication to every member : *In re London and General Bank* (*No.* 2). (1) The word " members " in sub-s. 1 of s. 134 means " all the members," but those who are present at the general meeting have power to receive the report on behalf of all the members. If the company does not convene a general meeting it becomes the duty of the auditors to communicate with all the members either in writing or verbally. [They also referred to *Leeds Estate, Building and Investment Co.* v. *Shepherd.* (2)]

Lionel Cohen K.C. and *J. B. Lindon* for the respondent auditors. The sole responsibility of the auditors consists in dealing with the balance sheet and reporting on it. They have no duty to the shareholders except through the directors. The responsibility of presenting the balance sheet to the shareholders is imposed upon the directors, and the duty of convening a meeting is imposed upon them and not upon the auditors. The latter have no duty to the shareholders except through the directors and they have, therefore, performed their duty with regard to the report as soon as they have sent in their report to the company. [They referred to *In re London and General Bank* (*No.* 2) (3) ; *Newton* v. *Birmingham Small*

(1) [1895] 2 Ch. 673.
(2) (1887) 36 Ch. D. 787, 802.
(3) [1895] 2 Ch. 673, 682.

Arms Co., Ld. (1); and *Cuff* v. *London & County Land and Building Co., Ld.* (2)]

Alexander Anderson for another respondent.

Christie K.C. in reply.

BENNETT J. [after deciding other questions raised by the summons, continued :] There remains for consideration the liability of the auditors, and that gives rise to a novel question of considerable importance not only to auditors but also to people who invest their money in companies registered under the Companies Act. Before dealing with the legal question it is desirable that I should state that I am satisfied that there is not a shadow of ground for suggesting that in the present case the auditors were guilty of any deliberate misconduct—in fact any allegation of that kind was expressly disclaimed at the Bar by Mr. Christie.

As I understand it, the duty of the auditors in this case is to be found stated in s. 113 of the Companies (Consolidation) Act, 1908, and s. 134 of the Companies Act, 1929. There is an immaterial and slight difference between the two sections, and I propose to refer to the Act of 1929, which in all material respects is identical with the corresponding section of the Act of 1908, although since the facts of the case took place in part before November 1, 1929, and in part after that date, both statutes apply. [His Lordship referred to ss. 129, 130, 132 and 134 of the Act of 1929 and continued :]

Now I think that the duty of the auditors in this case can be tested by reference to the reports and balance sheets for the years ending June 30, 1925, and June 30, 1926, both of which were signed by two directors. The reports annexed to these balance sheets were signed by the auditors. The question is what was the duty of the auditors in respect of those two balance sheets.

The auditors merely sent the reports and balance sheets to the secretary of the company, and they never got beyond the secretary. The directors never called a general meeting to consider these balance sheets and reports. The balance sheets were finished in 1928 so far as their preparation was concerned They were not signed until February, 1931, and the date on which they came into the hands of the secretary was February 12, 1931.

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(1) [1906] 2 Ch. 378.

(2) [1912] 1 Ch. 440.

Mr. Christie argued that, with respect to these two balance sheets it was the duty of the auditors imposed by s. 134, sub-s. 1, of the Act of 1929 to make a report to the members. That is the plain wording of the section, and it is an admitted fact that the members of the company have never seen a report made by the auditors on those balance sheets.

The first thing to do is to interpret the section which lays down the duty of the auditors. The important words of the section are "the members." Does the statute impose on the auditors the duty of making their report to every member of the company? Now, if you give to the words their plain meaning it would seem that that obligation is imposed on them. But when you begin to reflect on the question it cannot, I think, have been the intention of the Legislature to impose that duty on the auditors and it certainly has never been the practice, since the obligation has been imposed, for auditors themselves to send their report to every member of a company; and I think Mr. Christie, in the course of his argument, when pressed to give a definition of "members" shrank from saying that it was the duty of auditors to send their report to every member of a company. He contended that the word "members" meant "all the members," but that those present at the general meeting represented them all—so that, if there was a general meeting and at that general meeting report was presented those members present represented and were all the members. If, however, no meeting was called by the directors, then the word "members" had another meaning and meant "all the members."

It seems to be a strange way of interpreting a section in an Act of Parliament to say that a word is to have two different meanings. The word must have the same meaning at all times. I do not think it possible to hold that the words "the members" in s. 134, sub-s. 1, mean "all the members." It cannot be that the auditors are to be at the expense and trouble not merely of sending their report through the post but of delivering a copy to every member. It seems that one is forced by circumstances to limit the meaning of the words "the members" and I hold that they mean "the members assembled in the general meeting."

When that conclusion is reached the next point to be considered is whether it would be right to declare that the auditors are under some duty which it may not be possible for them to perform. If the report is to be made to the members in general meeting, then it would not be right I think to hold that the duty of the auditors is to make that report themselves to the members in general meeting, unless they can themselves call a general meeting or can compel some one else to call a general meeting. There are no means by which they can call a general meeting or compel other persons to convene a general meeting. The only persons who can call a general meeting are the directors or the members who have called upon the directors to do so and they have failed to do so. The auditors themselves are powerless.

In my judgment the duty of the auditors, after having affixed their signatures to the report annexed to a balance sheet, is confined to forwarding that report to the secretary of the company, leaving the secretary of the company or the directors to perform the duties which the statute imposes of convening a general meeting to consider the report.

This interpretation may give rise to a case in which matters which the shareholders ought perhaps to know are not brought to the attention of the shareholders as soon as they might be. There might, for instance, be a case where, on investigating the books, auditors have found that directors had obtained remuneration to which they were not entitled. It might be that directors would refuse to call a meeting and that, in consequence, matters would be kept from the knowledge of the shareholders. After all, shareholders have their own rights. The statute compels directors to convene a meeting once a year and compels directors to present reports to the general meeting and it is for the shareholders to see that the directors do their duty.

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Having come to the conclusion that the duty of the auditors is discharged by sending the report to the secretary of the company, it is plain on the facts proved in the present case that there has been no violation by the auditors of their duty.

Solicitors: *Wordsworth, Marr, Johnson & Shaw; C. Butcher & Simon Burns; Barlow, Lyde & Gilbert.*

J. L. D.

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WARWICKSHIRE COAL COMPANY LIMITED *v.* CORPORATION OF COVENTRY.

[1931. W. 2657.]

Mines—Conveyance—Reservation of Mines and Minerals—" Proper and necessary powers " of working—Right to support of surface—No power to mine owner to let down surface—Land Tax Redemption Act, 1802 (42 *Geo.* 3, *c.* 116), *s.* 80.

The Land Tax Redemption Act, 1802, s. 80, provides: " No mines or minerals . . . . belonging to any manors, messuages, lands, tenements, or hereditaments which shall be sold by any bishop or other ecclesiastical corporation . . . . for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any right, title, or claim to open or work the same . . . . shall pass by any conveyance of such manors, messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance, ... and such mines or minerals . . . . together with all proper and necessary powers for opening and working the same . . . . shall be always absolutely excepted and reserved to such bishops or other ecclesiastical corporations . . . . as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

In 1804 land in the city of Coventry was sold by a bishop in exercise of the power conferred by this Act, and in 1903 a lease of the mines and minerals under the land for the term of 99 years was granted by his successors in title. The question arose whether the lessees of the mines and minerals were entitled to work and get them in such a manner as to damage and let down the surface of the land and the erections thereon:—

Held, by the Court of Appeal (affirming Clauson J.'s decision) that the reservation of the mines and minerals together with all proper and necessary powers for opening and working the same, did not reserve either expressly or by necessary implication the right to work the mines and minerals so as to let down the surface. As it was not known at the date of the Act and the conveyance (as it was at the present time) that the mines and minerals could not be worked safely and with commercial efficiency without letting down the surface of the land, there was, in the absence of express words, nothing to affect the ordinary presumption that the land when conveyed was conveyed with the common right to support.

Dictum of Astbury J. in *Welldon* v. *Butterley Co.* [1920] 1 Ch. 130, as set out in the second proposition in the headnote, disapproved.

WITNESS ACTION.

By a conveyance dated January 30, 1804, the Bishop of Litchfield, in pursuance of the Land Tax Redemption Act, 1802 (which empowered him to sell land of his See for the purpose of redeeming the land tax), conveyed to the predecessor in title of the defendants certain land which included "Whitmore Park" in the City of Coventry upon which a number of small houses were erected later. The conveyance did not contain any express reservation of the mines and minerals; but it was enacted by s. 80 of the Act of 1802, that "no mines or minerals, or seams or veins of coal, metals, or other profits of the like nature belonging to any manors, messuages, lands, tenements, or hereditaments which shall be sold by any Bishop or other ecclesiastical corporation aforesaid, for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any right, title, or claim to open or work the same, ... shall pass by any conveyance of such manors, messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance, ... and such mines or minerals, seams or veins of coal, metal, or other profits aforesaid, together with all proper and necessary powers for opening and working the same . . . . shall be always absolutely excepted and reserved to such bishops or other ecclesiastical corporations aforesaid, as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

By a mining lease dated April 9, 1903, the mines and minerals and powers so reserved to the Bishop by force of the Act of 1802 were demised by the Ecclesiastical Commissioners for England (who were the successors in title to the Bishop) to the predecessors in title of the plaintiffs for a term of ninety-

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nine years at the rent and subject to the conditions contained in such lease and subsequently became vested in the plaintiffs for the residue of the term.

The plaintiffs claimed a declaration that, as lessees of the mines and minerals under the land so conveyed, they were entitled to work and get the same in such manner as to damage and let down the surface of the land and the erections thereon without incurring any liability to compensate the defendants.

The plaintiffs contended and called witnesses to prove that in the year 1804 the coal measures under the land in question had, in the neighbourhood thereof, been in fact worked by the long-wall system which, as then and as since employed, must necessarily result in causing subsidence of the surface and that, according to mining knowledge in 1804 and since that date, no other method of working those particular measures could, at all events with reasonable regard to safety and commercial efficiency be employed.

Sir Leslie Scott K.C. and *Evershed K.C.* for the plaintiffs. The powers of working the mines and minerals under the land comprised in the conveyance by the Bishop on January 30, 1804, were by s. 80 of the Act of 1802 reserved to the Bishop as fully and effectually as if the same had been expressly reserved to him in the conveyance itself. Plainly, upon the true construction of that section the right to work the mines was expressly reserved to the grantor upon the conveyance of the land. Under s. 80 the powers of the plaintiffs, as the present owners of the mines and minerals, are not limited to the more usual methods of working, but include such methods of working as may cause subsidence of the surface, if such methods were and still are, as it has been proved by the evidence, proper and necessary for the purpose of winning the coal which was reserved. Sect. 80 is in very general terms : it enacts that no mines, minerals or seams of coal are to pass under a conveyance, so that it follows that the whole of the mines, minerals and seams of coal were reserved to the Bishop. According to the natural and grammatical meaning of the language used, the section seems to confer power to let down the surface, if there is no other method of getting the coal which would not produce that result. It may be that such was the intention of the legislature. The section seems to show an intention to preserve strictly the rights of the mine owner, so that he may get the mines as freely as he could have done before the severance. In this case the method of working is the same now as it was in 1804, the long-wall system being the only system by which the coal can reasonably be worked. The principles applied by Astbury J. in *Welldon* v. *Butterley Company* (1) are applicable to this case. The section refers to mines unopened as well as opened and seems to have it in contemplation that the mines might be worked according to any improved methods which might be in vogue at a future date. The reservation is equivalent to a grant to the Bishop of all the coal under the land conveyed and all future improved methods of working are authorized: see *Dand* v. *Kingscote* (2) where a reservation of the minerals and the right to work them including the making and using of necessary wayleaves did not restrict the mineral owner to such description of wayleave as was in use at the time of the grant but entitled him to make and use railway lines and other modern appliances unknown at the date of the reservation; on the principle that whatever is necessary for the fair and reasonable enjoyment of the thing excepted is also reserved as incident to the exception: "cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit." Under the Mines (Working Facilities and Support) Act, 1923, it has held that the Commissioners were entitled to have regard not only to physical but even to economic and commercial considerations upon an application for ancillary rights to erect a ropeway for the conveyance of minerals over the lands of various landowners: *In re Tilmanstone Collieries, Ld.* (3).

Gavin Simonds K.C. and *Wilfrid Hunt* for the defendants. The plaintiffs have no right to work the mines so as to let down the surface. No investigation of the title would make it

(1) [1920] 1 Ch. 130.
(2) (1840) 6 M. & W. 174.
(3) (1927) 19 Ry. & Can. Tr. Cas. 26.

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sufficiently plain to a purchaser—and here the defendants purchased with the view of building—that he was purchasing land subject to the right of the vendor to destroy the surface. If the decision of Astbury J. in *Welldon* v. *Butterley Co., Ld.* (1) justifies the plaintiffs in so working the mines as to let down the surface, that decision is inconsistent with other decisions. In construing s. 80 of the Act of 1802, the intention of the legislature is to be ascertained by reference to the meaning of the words used at the date when the statute was passed: see Beal's Cardinal Rules of Legal Interpretation, 3rd ed., p. 314. The language of s. 80 ought not to be construed—as the language of the Inclosure Act of 1791 was by Astbury J. in the case last cited—in the light of subsequent scientific mining knowledge, but according to the state of mining knowledge as it was in 1802. Having regard to the state of mining knowledge in 1804, it is extravagant to suppose that the parties could have contemplated the possibility that at some distant future time the mines could be worked at such a depth as modern science has since shown that they can be worked. Had there been a proviso inserted in s. 80 that the mines should not be so worked as to let down the surface, such a proviso would not have been inconsistent with the rest of the reservation of the mines. "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication": per Lord Loreburn L.C. in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (2) and in the same case Lord Macnaghten said: (3) "In all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in

(1) [1920] 1 Ch. 130.
(2) [1906] A. C. 305, 309.
(3) Ibid. 313.

consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption . . . . holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award."

The main object of the Act of 1802 was to facilitate the sale of land for the purpose of redeeming land tax. The Act has, on the face of it, the very widest application, as it relates to land in any part of the country whatever, to lands the condition of the mines and minerals under which must naturally vary greatly. The reservation of the mines and minerals and powers to work them are by s. 80 of the Act, as a general principle of the Act, preserved to the vendor of the land. If the construction for which the plaintiffs contend is the right one and the vendor to whom the mines and minerals and working powers are reserved has the power so to work them as to let down the surface and if the Act allows him no option in the matter—as seems to be the case upon its proper construction—but prevents him from dispensing with his statutory right to the mines and minerals and powers to work the same, the result would be that a vendor would meet with almost insuperable obstacles when attempting to effect a sale of his land for the purposes of the Act, a result altogether inconsistent with the object which the legislature had in view. Had there been a proviso inserted in s. 80 that the mines and minerals should not be so worked as to let down the surface, such a proviso would not be at all inconsistent with the actual reservation contained in that section.

The following cases also were cited in which similar questions of construction were dealt with—namely: *Bell* v. *Love* (1); *Davis* v. *Treharne* (2); *Dixon* v. *White* (3); *Hext* v. *Gill* (4); *Butterley Co.* v. *New Hucknall Colliery Co.* (5); *Beard* v. *Moira Colliery Co.* (6); *Jones* v. *Consolidated Anthracite Collieries Ld.* (7); *Davies* v. *Powell Duffryn Steam Coal*

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(1) (1884) 10 Q. B. D. 547; 9 App. Cas. 286.

(2) (1881) 6 App. Cas. 460.

(3) (1883) 8 App. Cas. 833.

(4) (1872) L. R. 7 Ch. 699.

(5) [1910] A. C. 381.

(6) [1915] 1 Ch. 257.

(7) [1916] 1 K. B. 123.

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Co. (1); *Thomson* v. *St. Catharine's College, Cambridge* (2); *Consett Industrial & Provident Society* v. *Consett Iron Co.* (3)

Evershed K.C. replied.

Cur. adv. vult.

1933. Oct. 12. CLAUSON J. The plaintiffs in this action, who are a coal mining company, claim a declaration against the defendants, the Corporation of Coventry, that the plaintiffs, as lessees of certain mines under land known as Whitmore Park in the City of Coventry, are entitled to work and get the mines and minerals within and under those lands in such a manner as to damage and let down the surface of the lands and the works and erections thereon without incurring any liability to compensate the defendants or other the owners or occupiers of the lands.

In the year 1804 the lands in question, including the minerals, formed part of the lands of which the Bishop of Lichfield was seised in right of his See. By virtue of the Land Tax Redemption Act, 1802, the Bishop was empowered, with certain consents which were duly obtained, to sell the land in question for the purpose of raising moneys required for redeeming land tax, but it was provided by s. 80 of the same Act that no mines or minerals in such land as the Bishop should sell for that purpose, whether the mines should be opened or unopened, nor any right title or claim to open or work the same, should pass by any conveyance of the lands, either by express or general words, and that such mines and minerals, together with all proper and necessary powers for opening and working the same, should be absolutely excepted and reserved to the Bishop as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved.

By a conveyance of January 30, 1804, the Bishop conveyed to the predecessors in title of the defendants lands which included Whitmore Park, the property now in question, the conveyance on the face of it being a conveyance of the lands, without any exception or reservation of mines or minerals. There is, however, no doubt or controversy but that by reason of the provisions of s. 80, which I have already mentioned, the grantee under that deed, and the defendants as claiming under them, are in the same position as if the mines and minerals, with all proper and necessary powers for opening and working the same, had been expressly excepted and reserved by the conveyance. Under legislation with which it is not necessary for me to deal, the mines minerals and powers which are so to be treated as excepted and reserved became vested in the Ecclesiastical Commissioners for England, and there is no question but that by virtue of the lease which the plaintiffs hold from the Ecclesiastical Commissioners they are entitled to such mines minerals and powers. The question raised in this action may accordingly be stated to be whether the day after the conveyance of January 30, 1804, the Bishop could have proceeded to work such mines and minerals as were under the land in question in such manner as to damage and let down the surface of the lands.

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(1) [1917] 1 Ch. 488.

(2) (1918) 118 L. T. 758; [1919] A. C. 468.

(3) [1922] 2 Ch. 135.

So far as the terms of the conveyance are concerned it is clear that the lands in question became vested in full ownership in the predecessors in title of the defendants, with accordingly the benefit at common law of a right of support by any subjacent strata which for any reason had not become vested in them. The question is therefore whether, according to the true construction of s. 80 of the Act, the powers for opening and working the subjacent mines ought to be construed to include a power to let down the surface of the land contrary to common right. "In all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint": (see per Lord Macnaghten, *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) "It is therefore a question in each case of the proper construction of the instrument of severance, and unless the power to let down the surface be found there expressly or by necessary implication, the common law right of the surface owner to support will prevail. The mere fact of giving very wide general powers to sink pits and to work, get, and carry away coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed": (see per Swinfen Eady L.J. *Beard* v. *Moira Colliery Co.* (2))

I must accordingly turn to the words in s. 80 of the Act which, as I have explained, must by virtue of the Act be treated as read into the conveyance of 1804, in order to ascertain whether, by virtue of those words, it can be said that either expressly or by necessary implication power to let down the surface is to be found in the conveyance of 1804 on reading into it the exception and reservation prescribed by that section. It obviously cannot be said that, even so, there is any express provision to the necessary effect. Can such a provision be said to be implied ?

The argument in favour of such an implication was thus presented to me. It was said, and I will assume that it has been proved, that in 1804 the coal measures which underlie the piece of land in question had, in the neighbourhood of that piece of land, been in fact worked by the long-wall system of working, which, as then and as now employed, must, according to the evidence given before me, necessarily result in causing subsidence of the surface, and that, according to the knowledge of those concerned in such matters at the date of the conveyance, and equally according to the knowledge of those now concerned in such matters, no other method of

(1) [1906] A. C. 305, 313.

(2) [1915] 1 Ch. 257, 264.

working these particular measures can, at all events with reasonable regard to safety and commercial efficiency, be employed. It was then argued that I must construe the phrase "proper and necessary powers" as read into the conveyance of 1804 by virtue of s. 80 of the Act, as meaning such powers as are proper and necessary for winning the particular measures which exist under the piece of land conveyed, and that, so reading the words, I am driven to hold that the proper and necessary powers cannot be confined to mere usual mining rights, but must be extended to comprise the power to infringe the surface owner's common law right of support. Reference was made to the decision of Astbury J. in *Welldon* v. *Butterley Co.* (1), and it was suggested that, in regard to coal measures of such a character as those here in question, proper and necessary powers for opening and working them must necessarily include the power to let down the surface.

In my judgment it is not necessary for the purposes of this case that I should express any view of my own upon the decision in *Welldon* v. *Butterly Co.* (1), or on the grounds appearing in the judgment of Astbury J. Sect. 80 of the Act of 1802 has general application to any lands sold under the powers and for the purposes of that Act by any Bishop in any part of the country, whatever the character be of the coal seams which underlie such lands. If the plaintiffs' argument is to succeed, I must hold that that section enacts that the Bishop must be treated as reserving not only all powers and privileges usually found in mining grants and that without stint, but also in cases where in fact the underlying seams cannot be recovered without causing subsidence of the surface, a power to let down the surface against the surface owners' common law right. It is not enough, as I understand it, that I should find such a construction to be a possible construction of ambiguous words; I must be satisfied that no other construction of the words is fairly possible. It is to be observed that, if the wider construction of the section is the correct one, the Bishop cannot convey any land under the Act without, by implication, reserving to himself a right to let down the surface should

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(1) [1920] 1 Ch. 130.

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it be found that the minerals under the land cannot be won without letting the surface down; for it must be observed that the section does not merely give the Bishop the right to make such reservation as the section contemplates, but makes it imperative that the conveyance should either contain or should operate as though it contained the exception and reservation (whatever that may be) which the section prescribes.

In the course of the very careful and elaborate arguments of counsel I was taken through a large number of the many cases in which similar questions of construction have been discussed in the courts; but in no case has such a question been considered where it arose from words contained in such an enactment of general application as the enactment with which I have to deal. I venture to think that I should not assist any court which may hereafter have to deal with this case if I were to add one more to the long series of reported decisions in which those cases have been examined in detail.

The question is not one of the intention of the parties to the document. So far as the intention of the Bishop appears upon the conveyance, it was to grant to the predecessor in title of the surface owner the full rights in the land without exception or reservation. It is only the operation in invitum of s. 80 which forces the reservation upon the grantor. In my opinion there is nothing to justify me in reading into the section any such implication as to letting down the surface as is suggested. I am, in my view, bound on principle to hold that, while the proper and necessary powers for opening and working the mines which are by virtue of the Act to be reserved will no doubt include wide powers to sink pits and to work, get and carry away coal, the reservation does not, if I may borrow the language of Swinfen Eady LJ. in *Beard* v. *Moira Mining Co.* (1) "establish a right to get rid of the common law right of the surface owner to have his surface undisturbed."

Taking this view, I propose to declare that the plaintiffs' are not, by virtue of their lease, entitled to work and get the mines and minerals in question in such a manner as to let down the surface of the lands and the works and erections thereon. I omit from the declaration the word "damage" which appears in the statement of claim, as the use of it might give rise to difficulty. Some damage, such as that covered by the expression "temporary damage," as used by Mellish LJ. in *Hext* v. *Gill* (1), is, no doubt, authorized by the implied reservation.

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(1) [1915] 1 Ch. 264.

The plaintiffs in substance fail, and must pay the costs of the action.

H. C. H.

C. A.

The plaintiffs appealed. The appeal was heard on March 21 and 22, 1934.

Sir Leslie Scott K.C., *Spens K.C.* and *S. M. Krusin* for the appellants.

Gavin Simonds K.C. and *W. M. Hunt* for the respondents.

1934. April 17. LORD HANWORTH M.R. This action was brought by the plaintiffs, who are the lessees of certain mines and minerals lying under certain lands known as Whitmore Park, now within the area of the City of Coventry, for a declaration "that the plaintiffs in working and getting the coal in the demised mines by the method of long-wall working are entitled to damage, or let down, the surface of the said lands and the works and erections thereon or therein, without incurring any liability to compensate the defendants or other the owners or occupiers of such land in respect thereof."

The defendants are the owners of the surface of the lands of Whitmore Park which was acquired by them for the purpose of, and it has been now developed as, a housing estate; and they claim to be entitled to a right of support for their lands, and of compensation, if and when any damage or subsidence is caused to their surface lands by the action of the plaintiffs. Both the surface of Whitmore Park, and the minerals under it, were at the time relevant to the question to be decided, vested in the Bishop of Lichfield and Coventry as part of the lands belonging to his See. By Statute 42 Geo. 3, c. 116, power

(1) L. R. 7 Ch. 699, 714.

was given to certain corporations, including bishops, to sell their land subject to and with the approval of two of the Commissioners appointed under the Act to regulate, approve and confirm such sales, so as to enable them to redeem the land tax charged upon it. In exercise of the power given to him by this Act, the Bishop, with the consent of two Commissioners, by indenture dated January 30, 1804, conveyed the land in question to the predecessors in title of the defendants the conveyance containing a reservation "except and always reserved unto the said Lord Bishop, and his successors, all mines minerals and quarries of what nature and kind soever." The mines so reserved are now vested in the plaintiffs. The words quoted do not express the full terms of the reservation of the minerals which operated at the date of the conveyance, for by s. 80 of the Act already referred to it was provided—to reproduce the section in abbreviated form—" that no mines or minerals etc. which shall be sold by any bishop or other ecclesiastical corporation aforesaid, for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any right, title or claim to open or work the same . . . . shall pass by any conveyance . . . . either by express or general words in such conveyance, ... and such mines or minerals . . . . together with all proper and necessary powers for opening and working the same shall be always absolutely excepted and reserved to such bishops or other ecclesiastical corporations aforesaid, as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

Sir Leslie Scott called our attention to the fact that the words " together with all proper and necessary powers for opening and working the same " were newly introduced into the Act of 1802 and were not to be found in s. 12 of the Act of 1799, which was a section corresponding to s. 80 in one of the Acts which were consolidated in 42 Geo. 3, c. 116. " Proper working " of coal in this mining area was proved to have been, and still to be, by the long-wall system which causes subsidence on the surface, but the least disturbance of any system. The surface sinks more evenly than would happen if the coals were mined by the pillar-and-stall system. Coal is now mined at a depth of 2400 feet below the surface—a possibility quite unknown in 1802. If coal is to be extracted from these mines it will necessarily cause subsidence; but unless some subsidence is caused it is claimed that the mines and minerals cannot be properly worked.

It is argued that this explicit reservation to the See, of the mines and minerals together with all proper and necessary powers for opening and working the same was intended to recognize that the mines were of great value and ought to be exploited to the advantage of the See, even at cost to the surface owner; that it is a case to which the principle followed in the *Butterley Colliery Co.* v. *New Hucknall Colliery Co.* (1) applies—namely, that if the terms of the instruments make it clear that it was the intention of the parties that the subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata. The judgments in that case make it plain that the decision did not make any inroad upon the general rule that a surface owner enjoys a right to the support of his surface. Fletcher Moulton L.J. at the outset of his judgment (2) takes as an authoritative statement of the law a passage from the speech of Lord Loreburn L.C., in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (3), in these words: "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication . . . . If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down." These latter words are strongly significant to show that the presumed

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(1) [1909] 1 Ch. 37.

(2) Ibid. 48.

(3) [1906] A. C. 305, 309.

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right to support must prevail, unless some unequivocal intention in a contrary sense can be ascertained. Furthermore, that case shows that the onus of establishing this contrary intention lies on the owner of the minerals, and is not discharged by the insertion of full powers of working and carrying away all minerals expressed in general terms. But the Court in that case did find a necessary intention to allow subsidence without which the leases would have proved ineffective for the purposes for which they were entered into. *Beard* v. *Moira Colliery Co.* (1) is another case which affords an instance where the common law right to support was by necessary implication displaced. The conveyance to the surface owner reserved to the vendor and his successors in title—the defendants—a right to exercise all other powers for working and getting the minerals, " in as full and ample a way and manner as if these presents had not been made and executed." If the right to support had prevailed, the reservation in as full and ample a manner would have been curtailed, and so the reservation prevailed over the presumption of a right to support. Clauson J. quoted the well-known passage in Lord Macnaghten's speech in the *Butterknowle Colliery* case (2) which is to the same effect, and not less explicit than the passage which Fletcher Moulton L.J. quoted and which I have extracted. It is unnecessary to go back to earlier cases which affirm and expound the same rule. *Dixon* v. *White* (3) and *Love* v. *Bell* (4) were recognized and approved in the *Butterknowle* case (2). But it is argued that the intention in 1802 was to reserve power to win and get the coal. Nowadays, it is said, coal can be gotten at a depth that was not known a hundred and thirty years ago, yet the right reserved has become expanded, and cannot be circumscribed by the rights of a surface owner. They must give way to those reserved to the mineral owner, and *Dand* v. *Kingscote* (5) is cited as an authority that a right reserved is not circumscribed by such ways as were in use at the time when the right was reserved.

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(1) [1915] 1 Ch. 257.
(2) [1906] A. C. 305, 313.
(3) 8 App. Cas. 833.
(4) 9 App. Cas. 286.
(5) 6 M. & W. 174.

We are asked to draw an inference from the reservation under s. 80, that the intention was to permit the mines and minerals to be opened and worked with increasing results and success to the disadvantage of the surface owners whose rights to support have been correspondingly reduced as time has passed and newer mining methods have been introduced. In *Love* v. *Bell* (1), Lord Bramwell says (2) that he does not know if the antecedent probabilities are in favour of the respondents or the appellants. There, if the appellants were right, the owners of the soil could not use it to its best advantage until the minerals were exhausted and subsidence finished; while if the respondents were right the owner of the minerals could rightfully take one-half of them only—either way there was a loss. Respectfully, I find myself in the same difficulty. I cannot predicate that the surface owner was to lose to the advantage of the mine owner, or that the mine owner's powers were to be limited so as to preserve those of the surface owner. But in *Davis* v. *Treharne* (3), the House of Lords has laid it down that a clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the kind in the county," refers simply to the mode of carrying on the underground works for mineral purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people. Lord Blackburn says (4) that "a Court of law has . . . . to look at the documents and see whether the parties have agreed upon something different from the common right." The onus of establishing his right to work to the exclusion of the right to support that prima facie belongs to the surface owner, lies quite clearly upon the mine owner.

The evidence at the trial consisted of certain admissions made before the trial as to the system of working coal in Warwickshire, and the practice followed in 1804. In addition some oral evidence was called, from which it appeared that it cannot be affirmed that it was known in 1804 that mining at whatever depth produces subsidence of the surface. Yet the argument of Sir Leslie Scott and Mr. Spens went to the length of saying that the Bishop's powers in 1804 as to the surface were limited, that he could not sell land with a right to support, and that the statute by expressly reserving the minerals and the right to work them, gave to, or left in, the Bishop power to convey only such rights with the surface as were not inconsistent with the power to get the minerals in any suitable manner, to the full and exhaustive extent now possible under an improved system of mining.

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(1) 9 App. Cas. 286.
(2) Ibid. 301.
(3) 6 App. Cas. 460.
(4) Ibid. 467.

This argument must depend, first of all, upon the terms of the statute. When one examines s. 80 and applies the touchstone from the *Butterknowle Colliery* case (1), namely—whether "the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would create an inconsistency" with the terms of the reservation, it seems plain that the answer must be negative. If so, it cannot be said that the usual right of support is plainly contradicted by s. 80. In that case, it is claimed that the terms of the conveyance must be examined with a view to discovering whether the reservation contained in it prevented the right to support being granted. Once more *Davis* v. *Treharne* (2) throws light upon such an examination. There are certainly no stronger words in the conveyance of January 30, 1804, than there were in the clause examined in that case. The result is that there are no sufficiently clear terms to discharge the onus which the owner of the minerals must discharge before he can take away the presumed right of support which a conveyance of the surface imports as passing with it.

It has been suggested that the terms of an Inclosure Act may be treated as of particular significance as between the parties affected by it, and of a significance which is not to prevail generally. On this point it is noticeable that Lord Selborne L.C. in *Love* v. *Bell* (3), a case arising upon the construction of an Inclosure Act, took "the general law" applicable to the case of two owners, the one of upper strata, or the surface of the ground, the other of lower strata containing minerals

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(1) [1906] A. C. 305, 309.

(2) 6 App. Cas. 460.

(3) 9 App. Cas. 286.

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which are to be worked, "as fully established," as stated by Lord Blackburn in *Davis* v. *Treharne* (1) at the beginning of his speech. These words as to the rights of the surface owner are to the effect already stated, and conclude: "in common right, the person who owns the surface has a right to have it properly supported below by minerals, and if there are mineral workings under the surface, to have a proper support left for it by pillars." Lord Selborne adds (2) "Whoever claims against that, has the burden of proof thrown upon him." In *Thomson* v. *St. Catharine's College, Cambridge* (3) Lord Sumner says (4) that what the law will imply from an Inclosure Act as to the right of support to the surface from subjacent strata is essentially a question of construction of the Act as a whole. On this basis, it must be remembered that the Act (42 Geo. 3, c. 116) was passed to enable the land tax to be redeemed by the sale of the surface of the land, and in terms which were approved by the Commissioners: see ss. 72, 74 and 76. It would seem impossible to suppose that such sales could be of land without any right to support, and consequently at a depreciated price.

I will add a little more in reference to the case of *Welldon* v. *Butterley Co., Ld.* (5) In that case it is stated (6) that it was proved that long before the Inclosure Act, and at its date, coal under parts of the commons and other large areas in the neighbourhood was worked by a system under which all the coal was removed with the inevitable result of causing subsidence; but in no way interfering with the rights of common which were confined to grazing rights.

Upon those facts the learned judge held that mining according to the accepted system was authorized, even though the necessary result of subsidence followed. That was the decision; and so far it does not diverge from the authorities referred to above, where effect has been give to an intention demonstrated and not uncertain.

But the second proposition stated in the headnote, which

(1) 6 App. Cas. 466.
(2) 9 App. Cas. 289.
(3) [1919] A. C. 468.
(4) [1919] A. C. 503.
(5) [1920] 1 Ch. 130.
(6) Ibid. 133.

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was not necessary for the decision, appears to run counter to a number of decisions and cannot be supported. The mere right to get the minerals does not carry with it the right to get them and to injure the surface owner. As Lord Atkinson, at the end of his judgment in the *St. Catharine's* case (1), in a general summary of the cases puts it, "if in the absence of such express or implied authority" the owner of the minerals "should be obliged to leave his mines unworked he must put up with the loss."

For these reasons the appeal fails and must be dismissed with costs.

ROMER L.J. The question arising upon this appeal is of a kind that in some form or another has frequently engaged the attention of the Courts. It is the question whether the plaintiff company as the lessees from the Ecclesiastical Commissioners of certain seams of coal are entitled in working them to let down the surface of the land above, such land now being vested in the defendant corporation. The severance of the mines from the surface took place as long ago as January 30, 1804, when by an indenture of that date the then Bishop of Lichfield in exercise of the powers given him by the Act (42 Geo. 3, c. 116) conveyed the land in question to a predecessor in title of the defendants, the parcels in such conveyance being described by reference to the parcels comprised in a lease therein recited which contained an exception in these words: "except and always reserved unto the said Lord Bishop and his successors all mines minerals and quarries of what nature and kind soever." The reason for this exception is to be found in s. 80 of the said Act which so far as material is in these terms: "Provided always, and be it further enacted, that no mines or minerals, or seams or veins of coal, metals, or other profits of the like nature belonging to any manors, messuages, lands, tenements, or hereditaments which shall be sold by any bishop or other ecclesiastical corporation aforesaid, for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any

(1) [1919] A. C. 468, 498.

right, title, or claim to open or work the same . . . . shall pass by any conveyance of such manors, messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance, ... and such mines or minerals, seams or veins of coal, metal, or other profits aforesaid, together with all proper and necessary powers for opening and working the same, ... shall be always absolutely excepted and reserved to such bishops or other ecclesiastical corporations aforesaid, as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

It is contended on behalf of the plaintiffs that in view of this section the bishop had no power to deprive himself and his successors of the right to work the mines to the best advantage, and that inasmuch as in the present case the seams of coal under the defendants' land cannot be worked to the best advantage, and indeed in a commercial sense cannot be worked at all, without letting down the surface, the bishop was precluded by the section from conferring upon the purchasers from him any right of having the surface of the land supported by the coal. The plaintiffs say, alternatively, that, even if the bishop had power under the Act to confer such a right of support, he did not in fact do so by the deed of January 30, 1804. I must now examine these contentions.

Of the law generally applicable to cases where there has been a severance effected of land from the underlying minerals there can no longer be room for doubt. It has long since been settled by authorities that are binding upon this Court. "The law," said Lord Loreburn in the *Butterknowle* case (1), "presumes . . . . a right to support unless the language of the instrument . . . . or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication." The right continues if the language of the instrument admits of an interpretation which preserves it. This presumption arises

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(1) [1906] A. C. 305, 309.

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not only where the severance takes place by an act inter partes. It arises also where the severance is effected by virtue of an Act of Parliament such as an Inclosure Act. Why the law should make such a presumption is not very clear. It has sometimes been attributed to a common or natural right of support supposed to be possessed by land. That the owner of land is entitled to have it laterally supported in its natural state by the land of an adjoining owner is, of course, true. But the division up of land into horizontal strata in different ownerships is an unnatural state of affairs originating in comparatively modern times, and the question whether or not the upper strata are to be supported at all times by the lower must, I should have thought, apart from the authorities, be merely a question of intention to be solved in each case by a consideration of the circumstances existing at the time of the severance. If there be some inherent right in the owner of land to have it supported from below, there must also be, one would think, some inherent right in the owner of minerals to work them. At the time that the rule was laid down it was thought that minerals could always be worked commercially to some extent without letting down the surface, and in the circumstances it was, I suppose, considered reasonable to infer an intention that the minerals should be worked to that extent and no further. But whatever may have been the reason of the rule there can be no doubt that it exists, and that upon a severance of the surface of land from the minerals underneath a presumption arises that the land is to be supported, a presumption that can only be displaced by a clear indication of a contrary intention. In the present case, therefore, it must, I think, be held that upon an alienation of land by a bishop under the power conferred upon him by the Act of Geo. 3, the purchasers acquire a right of support from the underlying minerals unless there can be found a clear indication in the Act that the legislature had the contrary intention.

It is said that such a contrary intention is to be found in the fact that s. 80 of the Act excludes from the conveyance of the land not only the minerals but also all proper and necessary powers for opening and working the same. This of itself is immaterial. As was said by Lord Macnaghten in the *Butterknowle* case (1), " To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint." Lord Loreburn also said in the same case (2), " Words, however wide, that merely authorise the getting of all the minerals, have been held not to authorise so getting them as to let down the surface." But it is then said by the plaintiffs, and said truly, that the coal under the defendants' land cannot be worked commercially without letting down the surface, and they rely upon the decision of the Court of Appeal and the House of Lords in the *Butterley* case. (3) Now in that case it was apparent that, at the date of the severance of a certain seam of coal from the strata above it, the parties to the transaction intended that the seam should be worked, and knew that it could not be worked without causing the overlying strata to subside. It was very naturally held that the parties had clearly shown an intention that the overlying strata should not be supported. The governing consideration in the case was the knowledge of the parties at the time of severance. If the impossibility of working the coal without causing subsidence had only been discovered at a later date, the decision in the case, as I read it, would have been different. When the ownership in the coal is severed from that of the overlying strata it is, of course, always contemplated and intended that it shall be worked. Otherwise there would be no object in severing it. But it is impossible to imply an intention that it may be so worked as to let down the surface, unless it be known at the date of severance that it cannot be worked otherwise. In all these cases it is the intention of the parties that is being sought for, and intention presupposes knowledge. A man who has a seam of coal under his land, but is ignorant of that fact, cannot be said to have any intention in relation to it. If, therefore, the owner of a seam

(1) [1906] A. C. 313.
(2) Ibid. 309.
(3) [1909] 1 Ch. 37; [1910] A. C. 381.

of coal thinks at the time of its severance from the surface that it can be worked without disturbing the surface, it is impossible to attribute to him at that time an intention to let down the surface in working it, merely because he discovers at a later date that he was labouring under a mistake. Now there is no evidence in the present case that even remotely suggests that it was common knowledge in the year 1802 when the Act was passed that it was not possible to work coal at certain depths without letting down the surface. We know indeed that in those days the contrary view was very widely entertained. In these circumstances, I find it impossible to come to the conclusion that the legislature, when enacting s. 80 of the Act, intended that the bishop and his successors should be at liberty to work the coal reserved to them in such a way as to let down the surface in all cases where it might subsequently transpire that it could not otherwise be worked commercially. The possibility of such cases happening does not appear to have been within the scope of its vision. To impute to the legislature such an intention would be to impute to it a knowledge that it did not then possess.

It follows that in my opinion the Bishop of Lichfield had power to confer upon the purchasers under the conveyance of January 30, 1804, a right to have the land conveyed to them supported by the underlying minerals which he had no power to convey and which were by s. 80 of the Act deemed to have been expressly excepted and reserved in such conveyance. But it equally follows that in my opinion the bishop by such conveyance did in fact confer upon the purchasers such a right of support. Not only does the rule of law raise a presumption that the legislature intended to confer upon the bishop the power to convey the right of support, it also raises the presumption that he conveyed it in fact.

In each case the plaintiffs seek to escape from the presumption by appealing to the fact, only ascertained in recent times, that the coal under the defendants' land cannot be worked commercially without letting down the surface. But in 1804, just as in 1802, it seems to have been thought that it was possible to work all coal, so far as it was workable at all, without causing subsidence of the surface of the overlying land. It is just as impossible to attribute to the bishop in 1804 an intention that will defeat the presumption, as it is to attribute one to the legislature in 1802.

The proper test to be applied in all these cases has been laid down by the House of Lords in the *Butterknowle* case (1) as follows: "The same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down." If a clause to the effect stated were introduced into s. 80 of the Act or into the conveyance of 1804, it would not create the slightest inconsistency with the actual provisions either of the section or the conveyance.

For these reasons, as well as for those given by Clauson J., I am of opinion that this appeal fails and should be dismissed with costs.

I only wish to add that the decision of Astbury J. in the case of *Welldon* v. *Butterley Co.* (2), to the effect stated in the second part of the headnote to the report of that case, appears to me to be in conflict with the earlier decisions of the Court of Appeal and the House of Lords, and ought to be overruled.

MAUGHAM L.J. This appeal turns upon the true construction of a conveyance of January 30, 1804, by which the Bishop of Lichfield conveyed to the predecessors in title of the defendants in the present action lands now known as Whitmore Park which form part of the City of Coventry. The conveyance on the face of it was a conveyance of the lands with (by a reference to a previous lease) an exception or reservation of mines and minerals. The bishop, however, was empowered to sell only by virtue of the provisions of the Land Tax Redemption Act, 1802, which empowered a sale for the purposes of raising

(1) [1906] A. C. 309.

(2) [1920] 1 Ch. 130.

moneys required for redeeming land tax. By s. 80 of that Act it was provided (reading the section shortly) that no mines or minerals or seams or veins of coal, metals or other profits of the like nature belonging to lands which should be sold by any bishop for the purpose of redeeming land tax, whether the same should be opened or unopened, should pass by any conveyance, and such mines or minerals, seams or veins of coal, metal or other profits "together with all proper and necessary powers for opening and working the same" should be always absolutely excepted and reserved to such bishop "as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved." It follows then that the conveyance has to be read as if the reservation and exception were by the conveyance expressly excepted and reserved. It must, however, be borne in mind that the bishop did not in express terms reserve a right to let down the surface, as he might have done; still less did he make any provision for compensating persons who might be injured by a subsidence or by a destruction of the surface.

The Ecclesiastical Commissioners for England are the successors in title of the Bishop of Lichfield in respect of the mines and minerals, seams and veins of coal, metals and other profits excepted and reserved out of the said conveyance. By a lease dated April 9, 1903, the Ecclesiastical Commissioners for England demised to the plaintiffs, the present appellants, or their predecessors for the term of 99 years and at rents therein specified all the mines or seams of coal, ironstone, fireclay and brick earth under the lands forming part of Whitmore Park with full working powers. The question which arises is whether the plaintiffs as such lessees are entitled to work and get the mines and minerals and in particular the coal within and under the lands in question in such a manner as to damage and let down the surface of the lands and the works and erections thereon without incurring any liability to compensate the defendants or other the owners or occupiers of such lands. A number of facts were proved or admitted at the trial of the action and these it is desirable to summarize.

The coal beneath the surface of the said lands is at a depth of about 2400 feet. The seam is commonly known as the Warwickshire Thick coal. In 1804 there were no means of working coal at such a depth, but there was at that date no exact knowledge of the depth or thickness of the coal under the said land. Coal, however, was being worked within two miles at a depth of less than 1000 feet by the long-wall system common at that date in working Warwickshire coal. That system was in the year 1804 and still is the most approved and economic system employed in the Warwickshire coalfield. It necessarily causes subsidence of the surface, a fact which is at the present time well known amongst mining engineers. The extraction of about 16 feet of the coal from a gross thickness of about 20 feet will cause a subsidence of the surface of about 7 to 8 feet. The subsidence being gradual and regular causes less damage than the subsidence caused by pillar-and-stall working. There is no other practicable method known at the present time of extracting the particular coal in question except by what is known as the "retreating long-wall" method. A certain amount of coal may be got out by pillar-and-stall working, but it would not be a safe operation owing to the great danger of spontaneous combustion in these mines owing to the nature of the coal.

The argument for the appellants is of this character. It is said, and truly said, that the bishop was precluded by the Act of Parliament from parting with his mines and minerals, and was bound to reserve all proper and necessary powers for opening and working the same: that the mines and minerals cannot be worked either according to the method then in use in the district or by any feasible and commercial method at the present time except by the long-wall system: that that system necessarily involves subsidence, and accordingly that the conveyance of 1804 by necessary implication empowers the bishop or his assigns to work the mines or minerals with the necessary result of causing subsidence of the surface. This argument is not without a certain plausibility, but in my judgment it rests on two false assumptions which deprive it of weight, and I shall deal with these separately. In the first place, the argument I think assumes that a right of support to the surface in its natural state is like, or, at any rate, so resembles, an easement that it is only a question of construction as to whether such a right passes to a purchaser of lands. It was long ago decided by the House of Lords that the right of support from owners of the lower strata is of a special character. (See *Davis* v. *Treharne* (1), *Dixon* v. *White*. (2)) Lord Blackburn in the former case began his speech by saying (3) that it must be taken as perfectly settled law that " as of common right " the surface owner has a right to be supported by subjacent strata of minerals, and then after considering the cases in which such a right had been taken away and dealing particularly with the effect of a clause for making compensation he held (and here I will cite Lord Selborne's summary in the subsequent case of *Love* v. *Bell* (4) that " when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so merely by showing that there are other words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support." So close indeed is the connection between the ownership of the surface of lands and the right of support for them that in the case of *Dixon* v. *White* (5) Lord Blackburn, after explaining the meaning of the phrase that the right was given " of common right," showed that at one time it was thought that if the owner of land granted the surface reserving an express power to take away the minerals so as to destroy the surface such a power was void as being repugnant to and derogatory from the grant. In the same case Lord Watson (6) expressed the law thus : " If A conveys the surface to B, reserving the property of the minerals below it, A in the one case retains, and B in the other gets, a right to have the surface supported, unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance." A

(1) 6 App. Cas. 460.
(2) 8 App. Cas. 833.
(3) 6 App. Cas. 466.
(4) 9 App. Cas. 286, 289.
(5) 8 App. Cas. 833, 843.
(6) Ibid. 847.

similar proposition was involved in the judgment of Mellish L.J. in the case of *Hext* v. *Gill.* (1) A number of cases dealing with the same point but turning upon the construction of Inclosure Acts came from time to time before the House of Lords. In the well known *Butterknowle* case (*Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (2) Lord Macnaghten (3) summarized the matter, and pointed out that the surface owner in such a case is entitled of common right to support for his property in its natural position and in its natural condition without disturbance from mining operations unless such disturbance was authorized by an instrument of severance either in express terms or by necessary implication. He added that "the presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an Inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an Inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorized to work the minerals and enjoy the property as fully and freely as if the inclosure Act had not been passed." Lord Davey in the same case (4) observed that if there was no provision for giving compensation for the injury done to the surface it was almost conclusive that the common law rule was intended to apply. Some four years later the *Butterley* case reached the House of Lords (*Butterley* v. *New Hucknall Colliery Co.* (5)) This was a case where the appellants were the lessees of a seam of coal overlying another seam with

(1) L. R. 7 Ch. 699.
(2) [1906] A. C. 305.
(3) [1906] A. C. 313.
(4) Ibid. 315,
(5) [1910] A. C. 381.

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full powers of working the overlying seam, there being reserved to the owner the right of granting a lease of the underlying seam with full powers of working, subject to a covenant by the owner to indemnify the lessees of the overlying seam against physical damage caused by working the underlying seam. The lease was a modern one and it was proved that at its date the proper mode of working the underlying seam was by the long-wall system and that it was well known to both parties that this must produce subsidence, for the mine was not a shallow one, and it was not disputed that except in the case of shallow mines the working of the coal in the seam is inevitably followed by a sinking of the whole of the strata above and consequently of the surface. No doubt whatever was thrown upon the principles laid down by Lord Macnaghten in the *Butterknowle* case. (1) He was indeed a party to the decision in the *Butterley* case (2) and, while affirming what he had said in the former case, he stated that to him it would be difficult to imagine a case in which permission to withdraw support could be more clearly implied than it was in the later case. In my opinion it is a complete mistake to think that the later decision shows that in the light of modern knowledge the older cases would now be differently decided. It is still the law that on a severance of the surface and the subjacent mines the common right to support remains with the surface owner unless the interference or disturbance with the surface is authorized by the instrument of severance either in express terms or by necessary implication; and in this phrase the word "necessary" is used in the ordinary sense of the term. "Necessary implication" is certainly not established by showing that if profitable working of the mines is to be carried out the surface must be let down.

The second assumption on the part of the appellants which is, in my opinion, unjustified is the assumption that the conveyance of 1804 or the implied reservation contained in it can be construed by reference to modern knowledge in regard to the practice of mining. It should be remembered that s. 80 was a section which provided for a compulsory reservation

(1) [1906] A. C. 305, 315.

(2) [1910] A. C. 381.

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by the bishop on any sale under the Act, and the words in the reservation do not necessarily import that there are any mines or minerals at all under the land in question, nor that if there are any such they are workable at a profit by long-wall or pillar-and-stall or by any other method of mining. The reservation is not confined to coal. It includes all other mines or minerals in very wide terms, including ironstone and china clay, to mention only two of those minerals which have been the subject of decisions in our Courts. Nor do the words imply that the mines or minerals lie at such a depth that there is an implication that it will be possible to work them by any method. The conveyance in this respect is totally unlike a lease or a grant made by reference to actual knowledge of mines and minerals in a defined area and of the proper mode of working the same according to the custom of the district. In my opinion it is contrary to principle and quite unjustifiable to construe the implied reservation in the light of modern knowledge or modern systems of working. It would scarcely be more unjustifiable to invoke in the construction the provisions of the Mines (Working Facilities & Support) Act, 1923. The language used in the *Butterley* case (1) both by Lord Halsbury and Lord Macnaghten supports (if support were needed) the view that only facts known at the date when the severance took place could properly be referred to for the purpose of construction. I should add on this point that the case of *Dand* v. *Kingscote* (2) does not seem to me to help the contention of the appellants. It was a case in which, certain words pointing to the future being used, the Court held that under a particular description of wayleave the mine owner was not confined to such description of way as was in use at the time of the grant, but got such a wayleave as would be reasonably sufficient for the purpose of working from time to time all the seams of coal with a reasonable profit.

Some persons have supposed that it is now known that there is no method whatever by which any coal can be worked in any part of the country so as not to cause subsidence. (See *Welldon* v. *Butterley Co.* (3) where Astbury J. seemed to think that was a true inference from the facts established before him.) If the commercial working of coal is referred to, that is to say, the working of coal at a profit by the means now in use, with prices and wages as they are at the present time, the proposition may be true; but if it refers to shallow as well as deep mines, and includes cases where large pillars are left and where there is a strong roof, the evidence in the present case shows that it is untrue. Mr. Edwin Morgan, a well known mining engineer of Derby, giving evidence on behalf of the plaintiffs stated that if you could get strong rock you might be able to work out 40 per cent. without causing subsidence. I wish to add that I agree with what my brethren have said with reference to the decision of Astbury J. in *Welldon* v. *Butterley Co.* (1).

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(1) [1910] A. C. 381.
(2) 6 M. & W. 174.
(3) [1920] 1 Ch. 130, 140.

Counsel for the appellants with great candour admitted that it followed from their argument that if the mineral to be extracted was one which, like china clay, could not be extracted or worked without the total destruction of the surface that consequence must follow, and the surface could be destroyed without giving any compensation whatever to the purchaser under the conveyance of 1804 or his assigns. This alone seems to me to show that they are seeking to put a construction on the conveyance which in the light of the authorities is an impossible one. It may be useful to mention one further case, that of *Thomson* v. *St. Catharine's College, Cambridge* (2), where the decisions of Sargant J. and of the Court of Appeal are reported. Reference to the decision of Sargant J. will show that the learned counsel for the plaintiffs put forward in that case an argument on almost exactly the same lines as the argument that has been addressed to the Court in the present case. So far as the alleged right to cause subsidence was concerned the argument met with no favour. No judge was found willing in considering the evidence as to the practice of mining to go beyond what was in the contemplation of the parties at the date of the Inclosure Act; nor was any doubt thrown on any of the authorities which I have cited or on the principles which have to be applied when an

(1) [1920] 1 Ch. 130.

(2) (1918) 118 L. T. 758; [1919] A. C. 468.

owner of mines claims a right after a severance to let down the surface.

In my opinion it follows that the judgment of Clauson J. was right and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Stones, Morris & Stone, for Twist & Sons, Coventry; Sharpe, Pritchard & Co., for Vernon Younger, Deputy Town Clerk, Coventry.*

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O'REILLY *v.* PRUDENTIAL ASSURANCE COMPANY, LIMITED.

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Insurance (Life)—Person entitled to payment of sum assured—Agreement to pay sum assured to executors or administrators—Proviso that receipt of a relation of assured should discharge assurers and be conclusive evidence of payment to person lawfully entitled—Repugnancy—Right of personal representative to payment limited by proviso.

An Assurance Company issued to Mrs. Cregeen three policies on her life for sums amounting to about 45*l.* Each policy provided for payment of the sum assured to the executors or administrators of the assured and then contained the following proviso: "Provided always that the production of a receipt for the sum payable hereunder signed by any person being either an executor or administrator or the husband or wife or a relation by blood or connection by marriage of the assured shall be a discharge to the company for the same and shall be final and conclusive evidence to all intents and purposes that such sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same and that all claims and demands whatsoever against the company in respect of this policy have been fully satisfied."

The assured died on May 6, 1932, having by her will left all her property, which included the policy moneys, to her child Brenda O'Reilly. After the death of the assured, Doris Rose, a niece of the assured, claimed payment by the company of the policy moneys and, on production by her of the policies and a letter signed by the deceased assured stating that she was insured in the company for about 50*l.* and expressing her wishes that after payment of her debts her clothes and remaining money should go to her said niece, the company on May 20, 1932, in ignorance of the will and in good faith paid to Miss Rose the

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moneys due on the policies and took from her a receipt which was expressed to be in full discharge of all her claims under the policies.

On September 22, 1933, letters of administration with the will annexed were granted to Mrs. O'Reilly, and in the capacity of administratrix of the assured she claimed against the company to be paid the moneys due under the policies less a sum expended on the assured's funeral expenses:—

Held (affirming Clauson J.'s judgment), (1.) that the proviso was not repugnant to the covenant to pay to the executors or administrators of the assured but formed an integral part of the contract and qualified the covenant; (2.) that the exclusive right of the administratrix to receive and give a discharge for the policy moneys was subject to the terms of the contract entered into by the assured; and (3.) that the receipt from Miss Rose therefore operated as a valid discharge to the Assurance Company, with the result that the administratrix's claim failed.

Per Romer and Maugham L.JJ.: *Quaere* whether the Assurance Company could take advantage of the proviso if they made payment to some one other than the executors or administrators at a time when they knew that there were executors or administrators in existence.

Per Maugham L.J.: *Quaere* whether the Assurance Company could take advantage of the proviso if they knew that the assured's estate was large enough to be liable for estate duty.

Special Case stated by Industrial Insurance Commissioner.

The Prudential Assurance Company issued to Florence Emily Cregeen three policies on her life dated November 8, 1897, October 14, 1907, and November 9, 1908, the total sums assured thereby and payable at her death being 45*l*. 14*s*. 7*d*. Each of the policies provided for payment of the sum assured to the executors or administrators of the assured and contained the following proviso: "Provided always that the production by the company of a receipt for the sum payable hereunder signed by any person being either an executor or administrator or the husband or wife or a relation by blood or connection by marriage of the assured shall be a discharge to the company for the same and shall be final and conclusive evidence to all intents and purposes that such sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same and that all claims and demands whatsoever against the company in respect of this policy have been fully satisfied."

Florence Emily Cregeen died on May 6, 1932, and the policies were her property at the time of her death. She left one child, an illegitimate daughter Brenda Mary Victoria O'Reilly, to whom by her will dated September 13, 1923, she bequeathed all her property.

After the death of the testatrix, Doris Edith Rose, who was a niece of the testatrix, claimed from the company the sum payable under the said policies. And for that purpose she signed a claim form in which she stated that she was the niece and the only relation by blood of the assured and that the assured did not leave a will. She also produced to the company the three policies and a document signed by the assured on November 7, 1931, in which the assured, after stating that she was insured in the Prudential Assurance Company for about 50*l*., expressed her wishes that after payment of all expenses for illness, etc., and just debts, her clothes and remaining money should be given to Doris Edith Rose her niece, and that she should see that the assured was buried in a private grave in the parish where she should die. The policies and the said document had been handed to Doris Edith Rose by the landlady of the house in which the assured died. The body of the claim form was in the presence of Doris Edith Rose filled in by the company's agent Charles Martin, who had known the assured and had collected from her the premiums payable by her in respect of the policies: and on May 20, 1932, the sum of 45*l*. 14*s*. 7*d*. payable under the policies was paid by the company to Doris Edith Rose. At the time of such payment neither the company its agents or servants nor Doris Edith Rose were aware of the existence of the will or of Brenda Mary Victoria O'Reilly or of any other relation of the assured, except the said Doris Edith Rose, and such payment was made by the company in good faith; but the company made no inquiries whether the statements made in the claim form were true, save from Doris Edith Rose. The payment was made partly in cash and partly by a cheque for 19*l*. 14*s*. 6*d*. in favour of the undertakers who had carried out the funeral of the assured. The cheque was handed to the undertakers by Doris Edith Rose and their receipt obtained by her: and on May 19, 1932, in respect of those payments amounting together to 45*l*. 14*s*. 7*d*. she gave the company a receipt which was expressed to be in full discharge and satisfaction of all claims whatsoever which she could or might have under or by virtue of the said policies.

On September 22, 1933, letters of administration with the will of the assured annexed were granted out of the principal Probate Registry to Brenda Mary Victoria O'Reilly: and as such administratrix she claimed against the company to be paid the said sum of 45*l*. 14*s*. 7*d*. payable under the policies, less the sum of 19*l*. 14*s*. 6*d*. expended on the funeral expenses of the assured.

The matter in dispute between Brenda M. V. O'Reilly, the administratrix of the deceased assured, and the company, an industrial assurance company within the meaning of the Industrial Assurance Act, 1923 (which was whether the administratrix alone could, as she contended, give a valid receipt for the policy moneys or, as the company contended, the receipt given by Doris Edith Rose was a conclusive discharge to the company for the policy moneys), was in pursuance of s. 32, sub-s. 1, of the Industrial Assurance Act, 1923, referred by the disputants to Sir George Stuart Robertson K.C., Industrial Assurance Commissioner, and on December 18, 1933, the Commissioner stated his award in the form of a special case at the request of the company in pursuance of s. 7 (*b*) of the Arbitration Act, 1889, and s. 32, sub-s. 1, of the Industrial Assurance Act, 1923, applying s. 68, sub-s. 7, of the Friendly Societies Act, 1896: and by the award he stated that, if the administratrix of the deceased assured was right in her contention, then he awarded that she should be paid by the company the sum of 26*l*. 0*s*. 1*d*. and the fee of 10*s*. paid by her on the reference of the dispute: and, if the company were right in their contention, then he awarded that the claim of the administratrix should be dismissed.

The grounds of the applicant's contention upon which she relied when the matter was referred to the Commissioner fully appear from the judgment delivered by his Lordship.

1934. March 1. *A. T. Denning* for the applicant. The executor or administrator is the only representative of the deceased whom the law will recognize in respect of his personalities, and no words introduced into a contract can transfer to another his exclusive rights derived from such representation: Williams on Executors, 8th ed., p. 793; 12th ed., vol. i., p. 490; 11 Vin. Abr. 133, pl. 27; Sheppard's Touchstone, 7th ed., p. 468. Consequently, the right to be paid and give a valid discharge for the policy moneys on the death of the deceased assured is a right of which the legal personal representative of the deceased cannot be deprived by any contract of the deceased. The proviso is inconsistent with the express covenant by the insurers to pay the executors or administrators of the deceased assured and can have no effect on the covenant: *Furnivall* v. *Coombes.* (1) That case was followed in *Watling* v. *Lewis* (2), where the covenantors attempted to qualify their covenant by using words the effect of which would be to destroy the personal liability of the covenantors. It is necessary to insert in a policy the name of the person interested therein: Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 2. The omission to do that renders the policy unlawful and void: *Evans* v. *Bignold.* (3) That requirement does not apply to insurances under the Friendly Societies Act, 1850 (13 & 14 Vict. c. 115), or under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36. In *Yangtsze Insurance Association* v. *Lukmanjee* (4), which was a marine insurance case, there was no evidence that the policy was effected to cover the interest in the goods of the respondent and it was held he could not sue on it. In the case of a Friendly Society, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58, expressly provides, in a case of intestacy, for the distribution of a sum not exceeding 100*l.* without letters of administration. The present case is distinguishable from *Da Costa* v. *Prudential Assurance Co.* (5), because there it was clear that the policy enured for the benefit of the son of the assured and that, if the policy moneys

(1) (1843) 5 Man. & Gr. 736.

(2) [1911] 1 Ch. 414, 424.

(3) (1869) L. R. 4 Q. B. 622.

(4) [1918] A. C. 585.

(5) (1918) 120 L. T. 353.

were paid to the executrix of the assured, she would hold them as trustee for the son and it was not competent for her to sue for the moneys which had already got home to the son. Here, however, the payment to Doris Rose interfered with the due administration of the assets of the assured after her death, the covenant to pay being with and for the benefit of the assured. Accordingly the proviso is unlawful and has no effect upon the covenant to pay the executors or administrators of the deceased assured.

W. P. Spens K.C. and *G. R. Blanco White* for the Prudential Assurance Company. The rights of the applicant must depend upon the terms of the contract with her on the part of the company: unless it be shown that the contract offended the law or public policy, it is binding on the applicant. The purpose of the proviso was to protect the insurers and for the convenience of the assured, not to confer any beneficial interest in the policy moneys upon the person to whom the moneys might be paid in pursuance of the proviso. The fallacy underlying the applicant's claim is that it is not true to say that an administrator has the exclusive right of receiving and giving a discharge for a debt due to the estate of a deceased: an administrator de son tort may in due course of administration do all acts which a rightful administrator may do. He is liable to be sued by the rightful representative: Halsbury's Laws of England, vol. 14, p. 149, para. 284. But where a widow, not purporting to act in the capacity of administratrix, by a single wrongful act delivered goods of the intestate to the defendant, the defendant was not allowed to claim the goods as against the lawful representative: *Mountford* v. *Gibson*. (1) The proviso here is perfectly valid, because it merely qualifies the liability under the covenant without destroying it, and it is, therefore, not repugnant to the covenant: *Williams* v. *Hathaway* (2), following *Furnivall* v. *Coombes*. (3) But where there is a covenant to pay money to the covenantee, it is lawful for the parties to agree that payment after the death of the

(1) (1804) 4 East, 441.
(2) (1877) 6 Ch. D. 544, 549.
(3) 5 Man. & Gr. 736.

covenantee to some other person than the lawful representative shall be a good discharge of the covenantor's liability under the covenant. Further, the contract of which the proviso forms an integral part binding the covenantor must also be binding on his personal representative : *Kiddill* v. *Farnell.* (1) There is no authority by which a contrary view has been established. A contract of a somewhat similar nature was enforced in *Law* v. *George Newnes, Ld.* (2), even though by the contract between the parties the beneficial interest in the money purported to be transferred. *Hunter* v. *Hunter* (3) is a similar case to the last. It is somewhat significant that the legislature should by various statutes have thought fit to enable payment to be made to persons other than the covenantee. In each of the following American cases—namely : *Thompson* v. *Prudential Insurance Co. of America* (4) ; *McCarthy* v. *Prudential Insurance Co. of America* (5) ; and *Prudential Insurance Co. of America* v. *Howell* (6) the same point arose in circumstances similar to those in the present case, and it was held that payment to a person referred to in the "facility of payment" clause in the policy was a good discharge as against a claim by the administrator of the deceased assured.

Clauson J. This matter comes before me in the form of an award, stated in the form of a special case, by Sir George Stuart Robertson, Industrial Assurance Commissioner. The case is designed to raise a question of interest and one of far-reaching importance.

The Prudential Assurance Company issued a policy to one Florence Emily Cregeen upon her own life, the total sum thereby assured being a sum of 45*l.* odd. There were three policies, but I deal with them, for simplicity's sake, as though there were only one. It provided in the usual way for payment of the sum assured to the administrators or executors of the assured. It was a sum, of course, payable at death.

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(1) (1857) 3 Sm. & Giff. 428.

(2) (1894) 21 R. 1027 ; 31 Sc. L. R. 888.

(3) (1904) 7 F. 136.

(4) (1907) 104 N. Y. S. 257.

(5) (1930) 169 N. E. 645.

(6) (1930) 289 Pacific Rep. 734.

It contained the following proviso. [His Lordship then read the proviso the terms of which are stated above and continued :] Florence Emily Cregeen died on May 6, 1932. On May 20, 1932, that is, fourteen days after her death, the company paid the sum assured by the policy to one Doris Edith Rose. Doris Edith Rose is a niece of Florence Emily Cregeen, and admittedly came within the class of persons mentioned in the proviso from whom, if the proviso is valid, the company may take a receipt. At the time of such payment neither the company nor Doris Edith Rose were aware of the fact, which ultimately came to light, that Florence Emily Cregeen had made a will, by which she had bequeathed all her property to Brenda Mary O'Reilly. The payment was made by the company in good faith. The company were not aware of the existence of Brenda Mary O'Reilly or any other relations of the deceased, except Doris Edith Rose. The company made no inquiries as to whether the statements which Doris Edith Rose made on the claim form were true, save the inquiries which they made of her. Doris Edith Rose, in fact, produced a bill for the funeral, and payment was made partly in cash and partly by cheque in favour of the undertakers who had been employed to carry out the funeral. The claimant, the administratrix, is prepared, in any view of the matter, to give credit for the 19*l.* 14*s.* 6*d.* expended on the funeral expenses, but claims the balance of the sum of 45*l.* 14*s.* 7*d.* She claims it upon the ground that the proviso which I have stated, for one reason or another, is not effective for its purpose.

It is common knowledge that these small industrial policies are issued for the purpose of providing, upon the death of persons in a humble position of life, an immediate sum for meeting, first of all, funeral expenses, and, secondly, other sums which naturally have to be met at the time of death ; and, whether the proviso is effective or not, the object of inserting it in the policy, plainly, is to enable payments to be made immediately without the delay, and, it may be in some cases, the expense, which would have to be incurred in taking proper, formal steps for bringing into being persons who could give the ordinary receipt.

It would be convenient, I think, that I should read the contentions on the part of the applicant as stated by the Industrial Assurance Commissioner. The contentions have been put before me, if I may venture to say so, in a most lucid and interesting argument by Mr. Denning on her behalf. The first contention is this: "That she as administratrix is the only representative of the deceased that the law will regard and no word or words introduced into the policy can transfer to another the applicant's exclusive rights derived from such representation to receive the moneys and give a discharge." Then secondly: "That the proviso relied upon by the company is repugnant to the express clause making the sum assured payable to the executors or administrators of the assured and is to be rejected." Thirdly: "That the proviso is void as being repugnant to law and public policy, in that the power given by it to the company to select the person to whom they should make payment is contrary to the law as to the administration and devolution of estates; and in that payment to any of the persons referred to other than the executors or administrators would or might enable the claims of creditors, legatees, the Inland Revenue, or the Crown to be defeated, and in that a power to pay a person other than the executors or administrators is contrary to the tenor of ss. 1 and 2 of the Life Assurance Act, 1774, and would or might enable those sections to be evaded." The fourth is: "That the proviso is void for uncertainty in that it leaves the payee unascertained and undetermined." Fifth: "That the nature of the evidence admissible to defeat the claim of the administratrix or to ascertain who is legally entitled is determined by law and cannot be affected by the policy or any agreement of the deceased." And sixthly: "That the company by their own act paid money to a person not entitled either at law or in equity and cannot rely on that act as an answer to the claim and/or paid the money without sufficient inquiries or proof of title and cannot therefore rely on such payment as an answer to the claim."

I think it will be convenient that I should deal first with the question of repugnancy. I am unable to see that there is anything repugnant in this proviso. A clause which follows a covenant, which is in such terms as to destroy the covenant, will be repugnant, but, as I read this clause, it provides for this: the policy having provided that on the death the sum in question shall be paid to the executors or administrators, the obligation imposed by the covenant must be read with the sentence which immediately follows it, and the covenant is thereby cut down to the extent that a certain act which the proviso defines is to be treated as satisfying the covenant in the event which the proviso indicates. I see nothing repugnant in a provision in a contract by which A undertakes to pay on a certain date money to B, with the proviso that A may, at his option, satisfy that obligation in some other manner, say, by handing over a sum of stock or shares in a company. There is nothing repugnant in that, and it will be observed that there is nothing in the provision in the policy which in any way affects the right of the executors to enforce the contract, or gives a right to any person other than the executors to enforce the contract. The proviso merely provides that if the company does a certain act, that is to be accepted as satisfaction of their obligation. The act is the production of a receipt for the sum payable, signed by certain persons there defined. The clause, besides providing that the production of that receipt is to satisfy the obligation, adds that that receipt is to be a discharge and final and conclusive evidence that the sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same. But the most important words, to my mind, are the words which provide that that production shall be "conclusive evidence that all claims and demands against the Company have been fully satisfied." That appears to me to be the equivalent of saying that it is part of the contract that the production of a receipt complying with the terms of this proviso is to be accepted as a satisfaction of the covenant. If that be the true construction of the proviso, it seems clear that, as between the two contracting parties, the proviso would be perfectly good. Does any difficulty arise from the fact that, owing to the inherent nature of the contract, the proviso must necessarily operate, not as between the company and the actual person whose life has been insured, but his executors? I cannot see that it makes any difference. The executors have no higher contractual right than the dead man, and accordingly, I see no reason for holding either that this proviso is repugnant, or that there is any difficulty in giving full effect to the contract, because effect is being given to it, not as against the original contractor, but his executors and administrators, who, in due course of law, are the persons who are entitled to enforce the contract, but to enforce it only according to its tenor and not with any higher right to enforce it than the policyholder himself had.

Having made those remarks, let me turn once more to the contentions which the applicant has stated in the special case. The first one is the most important, and it is: "That she, as administratrix, is the only representative of the deceased that the law will regard"—as to that there can be no doubt—"and no word or words introduced into the policy can transfer to another the applicant's exclusive rights derived from such representation." In my view, no words in the policy seek to transfer to another the applicant's exclusive rights derived from such representation. She, and she only, can sue. It is not suggested—if it were suggested it would be plainly incorrect—that this clause gives anybody else than the executor a right to sue. The contention refers to "the applicant's exclusive rights derived from such representation to receive the moneys and give a discharge." But the applicant's right to receive the moneys and to give a discharge is sub modo only; it is such right as appears from the tenor of the contract, and no words introduced into the clause, so far as I can see, in any way transfer to another her rights as so defined.

The second contention is that the proviso is repugnant to the express clause. With that I have already dealt.

The third contention is that the proviso is void as being repugnant to law and public policy. I can see no foundation for that contention. I do not see anything contrary to law in it. There is no attempt to interfere with the law which governs devolution of personal property to the executor and to no one else, nor do I find, and indeed I think it was scarcely contended, that anything in the proviso could be said to be directly contrary to the Life Assurance Act of 1774. The utmost that was said was, that a clause of this kind might be used as a device to get round some of the provisions of that Act. If any case arises in which it can be suggested that such a course has been taken, it will be time enough to consider how far the attempt to evade any law has been successful : but no such point can be raised upon the facts here.

Then the contention that the proviso is void for uncertainty, in that it leaves the payee unascertained and undetermined, seems to me to be quite without foundation. There is no uncertainty about the matter at all. That is certain which can be made certain, and there is ample provision for making certain the operation of the proviso.

The next contention is : "That the nature of the evidence admissible to defeat the claim of the administratrix or to ascertain who is legally entitled is determined by law and cannot be affected by the policy or any agreement of the deceased." That is merely a variant of the fallacy which I have already indicated, the fallacy that the proviso in some way or other affects rights which are vested in the executrix. The proviso does nothing of the kind ; the proviso limits the rights, and it is the limited rights alone which become vested in the executrix.

The last contention is : "That the Company by their own act paid money to a person not entitled either at law or in equity." I need not spend time upon that, having regard to the view of the operation of the proviso which I have already expressed.

In my view, the applicant is wrong in her contentions, and accordingly, having regard to the terms of the award, the claim of the applicant will be dismissed.

The case being one of far-reaching importance, I am prepared to express my opinion that it is a proper one for appeal.

H. C. H.

The applicant appealed. The appeal was heard on April 24 and 25, 1934.

D. N. Pritt K.C. and *A. T. Denning* for the appellant.

Wilfrid Greene K.C., *W.P. Spens K.C.*, and *G. R. Blanco White* for the respondents.

Lord Hanworth M.R. This is a very plain case, and I would have been content to say that I agreed with the judgment delivered by Clauson J. but for the interesting argument presented to us by Mr. Pritt and Mr. Denning on behalf of the appellant. In deference to those arguments I will add a little to what Clauson J. has said, at the same time making it clear that I agree with his reasoning and his conclusion.

The point that we have to decide is a narrow one, and it is a dispute between Mrs. Brenda Mary Victoria O'Reilly, called the applicant in the case, and the Prudential Assurance Company. [His Lordship then stated the facts, and after reading the material proviso in the policies of assurance continued :] In the dispute that has arisen the applicant contends " that she as administratrix is the only representative of the deceased that the law will regard, and no word or words introduced into the policy can transfer to another the applicant's exclusive rights derived from such representation to receive the moneys and give a discharge." Let me repeat, lest there should be any doubt about it, that the company did not have any knowledge of Mrs. Cregeen's will or of the existence of her child, the present applicant : they had no knowledge at all which prevented them from acting upon or gave them notice not to act upon the terms of the proviso.

The first point made by Mr. Pritt and Mr. Denning is that the administratrix took a vested interest in the moneys secured by the policies of assurance which could not be divested or taken away from the administratrix by the proviso, and that the administratrix is the only representative that the law will regard. They have, to my mind, failed to

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establish that proposition. This is a contract between the deceased and the company, a contract which both parties were competent to make, and it provides that payment after death shall be made to the executors or administrators of the assured, with a qualification contained in the proviso which entitles the company to recognize, and to pay the policy moneys to, any of the various persons named in the proviso, persons who have been called in one of the American cases which have been referred to, the circle of persons entitled to receive the policy moneys. There is no question that the person to whom payment in this case was made was within that circle; and unless a title to this money had become vested in the administratrix, a title which could not be defeated, the company were entitled, under the very terms of the policies, to put in answer to any claim proof of this payment, which by the very terms of the contract is made final and conclusive evidence that all claims under the policy have been fully satisfied.

But it is said that if the terms of the contract go as far as that, there is a repugnancy between the express clause providing for payment of the assured's personal representatives and this proviso. So to hold would, to my mind, be to misread the terms of the proviso and the express clause. The two must be read together. The proviso is intended to qualify and cut down the absolute terms of the express clause; in other words, regard must not be given to the words of the express clause in their absolute signification without bearing in mind the qualification introduced by the proviso. In *Da Costa* v. *Prudential Assurance Co.* (1) Bankes L.J. says of an identical proviso: "It is not repugnant," and Eve J. says: "The proviso is merely qualifying the provision." I cannot then find, upon the construction of the clause and the proviso, ground for saying that such a repugnancy exists as to render the proviso ineffective. We are not dealing here with any grant between parties, and no such consideration arises as whether there has been a derogation from grant. We have simply to construe the contract between the

(1) 120 L. T. 353, 355.

parties. I therefore come to the conclusion that upon the true construction of the express clause and the proviso there is no repugnancy.

I am also unable to assent to the argument that the proviso is void as being repugnant to law and to public policy. It must be remembered, as was pointed out by Clauson J., that in these cases it is of great importance to those who are insured under policies of this kind that there should be a payment as early as possible. In many cases there is no estate to be administered; there is no executor or administrator; and the proviso is one which, from the point of view of public policy, seems rightly to find its place in a contract of this nature and to be useful in the interests of the assured.

Then, with regard to the contention that the proviso is void for uncertainty, Clauson J. has given the requisite answer to that by referring to the well known Latin maxim: "Id certum est quod certum reddi potest."

I come to the last contention—namely, that this contract admits evidence to defeat the claim of the administratrix. This contention is relevant only if and when it has been decided that an absolute right devolves upon the executor under this contract. Another argument has been put by Mr. Denning—namely, that if this proviso is treated as an authority to receive the money, then that authority would be revoked by death. Of course he is right in that proposition. But it is quite unnecessary, and indeed very difficult, to construe this proviso as an authority to receive the money as an agent on behalf of the deceased. That is not the nature or the quality of the provision. It provides, in the interests of both parties, for the money being paid to any of certain relations in cases where the amount receivable is such as not to make it necessary (as is the fact in many cases) to have an administration of the estate; and, as I have already said, it enures for the benefit as much of the assured as of the Prudential Company.

For these reasons, it appears to me that the appeal must fail.

I will only add that in the *Da Costa* case (1) the Court, although it was unnecessary for the decision in that case, recognized—obiter, it may be—that the proviso was not repugnant, as the express clause and the proviso must be construed together. Another case cited to us was *McCarthy* v. *Prudential Insurance Co. of America* (1), and in that case the effect of the decision was that upon a clause of the same nature as the proviso in this case, called the "Facility of Payment" clause, a payment under it to McCarthy's sister of 275 dollars was held to be a valid payment which operated as a discharge to the Insurance Company. All that had actually to be determined was whether the receipt was effective to discharge the whole liability, which upon the face of it amounted to 392 dollars; and the Court held that, although the payment was good in respect of the 275 dollars, the difference between the 275 dollars and the 392 dollars must still be paid, for there was no authority or right under this clause to pay other than the full sum due under the policy. That decision deserves great respect, and it certainly helps to validate the clause which we have been discussing.

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(1) 120 L. T. 353.

For these reasons I have come to the conclusion that the appeal fails and must be dismissed with costs.

Romer L.J. I agree, and I only want to add this: As at present advised—and I say "as at present advised" because the point has not been argued on behalf of the Prudential Assurance Company—I do not think the company could take advantage of this proviso if they made the payment to somebody other than the executor or administrator at a time when they knew of the existence of an executor or administrator. In the present case they made a bona fide payment at a time when they did not know that there was any executor or administrator; and, that being so, there is nothing in principle or authority which would enable this Court to deprive the Prudential Assurance Company of the protection which the proviso obviously was intended to give them.

(1) 169 N. E. 645.

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Maugham L.J. I am of the same opinion.

I agree with the judgment of Clauson J. and with what has fallen from my learned brethren. I will only repeat that we are not deciding that the Assurance Company could rely on the clause, if at the moment of payment under the clause in question there was, to their knowledge, an executor or administrator, and I will only add that we are not deciding that they can rely upon it if they know that the property of the deceased exceeds in value 100*l.*, so that the estate attracts estate duty. Nor are we deciding that when Miss Doris Edith Rose received the sum of 45*l.* 14*s.* 7*d.* she was entitled not only to pay the funeral expenses of Florence Emily Cregeen but also to receive and retain for her own benefit the balance of that sum. That question does not in any way arise before us.

With those qualifications I agree entirely with what my learned brethren have said, with the result that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Fladgate & Co.*; *Herbert H. Moseley.*

H. C. G.

CLAUSON
J.
1934
March 16.

In re GAGE.

CROZIER *v.* GUTHERIDGE.

[1934. G. 6.]

Will—Construction—Legacy—Bequest of sum of Five per Cent. War Loan—Specific or general—Government Conversion Scheme—Notice to testator of intention to redeem—Repayment to testator in cash—Finance (No. 2) Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 49), *Part III., ss.* 11, 14.

By his will dated March 3, 1932, a testator bequeathed to his niece E. M. R. the sum of 1150*l.* Five per Cent. War Loan 1929–1947 stock and gave his residuary estate to G. C.

At the date of his will the testator held 1150*l.* War Loan of that denomination and in pursuance of a notice given to him by H.M.'s Government in accordance with a Prospectus dated January 11, 1917, of their intention to redeem the Five per Cent. War Loan 1929–1947, and of the Finance (No. 2) Act, 1931, Part III., s. 11, sub-s. 1 (*b*), elected to make a "repayment application," and in December, 1932, was repaid in cash in respect of his said holding. On April 23, 1933, the testator died, not then being the holder of any War Loan of the description of the War Loan so bequeathed:—

Held, first, that upon the construction of the will the bequest was a general bequest of 1150*l.* Five per Cent. War Loan 1929–1947; secondly, that the Three and a Half per Cent. War Loan in which the testator's holding would have been "continued" if he had not elected to claim repayment of his holding of the Five per Cent. War Loan was, for the purpose of giving effect to the general legacy, the same War Loan as the Five per Cent. War Loan 1929–1947; and thirdly, that the legatee was entitled either to call upon the trustees of the will to purchase for her 1150*l.* Three and a Half per Cent. War Loan or to be paid such a sum as would purchase the same.

ADJOURNED SUMMONS.

Arthur Gage by his will dated March 3, 1932, made the following bequests: "I give and bequeath unto my niece Eleanor M. Raynham the sum of 1150*l.* Five per Cent. War Loan 1929/47 stock And to Marian Gissing the sum of 500*l.* New South Wales Five per Cent. stock now standing in my name and I direct that the said sums shall be paid free of duty." The testator then devised and bequeathed his residuary estate to Gertrude Cunliffe absolutely.

At the time he made his will the testator held 1150*l.* Five per Cent. War Loan 1929-1947 and 500*l.* New South Wales Five per Cent. stock.

In pursuance of a notice given to him in accordance with the Prospectus dated January 11, 1917, of the intention of H.M.'s, Government to redeem the Five per Cent. War Loan 1929-1947, the testator applied for repayment ; and in December, 1932, he was repaid in cash in respect of his said holding of 1150*l.* Five per Cent. War Loan 1929-1947.

The testator died on April 23, 1933, at which date he held no War Loan answering the description of the War Loan he bequeathed to his niece.

Between the date of the will and the death of the testator the legatee Eleanor M. Raynham was married to Richard A. Gutheridge.

By the summons which was issued on behalf of the executor of the will, questions were raised whether the bequest of the War Loan was specific, and, if so, whether it had been adeemed or whether it was a general bequest and, if so, whether the plaintiff, the executor, ought to purchase out of the testator's estate 1150*l.* Three and a Half per Cent. War Loan for the defendant Mrs. Eleanor Gutheridge.

A. C. Nesbitt for the plaintiff.

Denis Johnston for Mrs. Gutheridge. Upon the proper construction of the will, the bequest of the 1150*l.* Five per Cent. War Loan is a general legacy ; that bequest is not qualified by the words " standing in my name," and it is a general legacy in spite of the fact that the testator held at the date of the will War Loan of that description sufficient to answer the bequest : Hawkins on Wills, 3rd ed., rule stated on p. 349. The bequest operated as a direction to the executor to purchase the War Loan for the legatee out of the general estate : *In re Tyler* (1) where a bequest of 42,000*l.* Russian Five per Cent. stock was held to be a legacy of such a sum as would at the testator's death purchase 42,000*l.* of that stock : see also a similar case of *In re Gray* (2). The bequest does not fail by reason of the absence of War Loan of the same description as the subject of the bequest, because War Loan offered by the notice to the testator is the same stock as

(1) (1891) 65 L. T. 367.

(2) (1887) 36 Ch. D. 205.

the Five per Cent. War Loan which a holder of that stock was entitled under s. 11, sub-s. 1 (*a*) (i.) of the Finance (No. 2) Act, 1931, to have continued. This view receives support from s. 14 of that Act, which enables trustees who are authorized to invest the trust funds in Five per Cent. War Loan 1929–1947 to invest in the Three and a Half per Cent. War Loan.

Grange Turner for the residuary legatee. Upon the construction of the will the words "standing in my name" apply as well to the bequest of the Five per Cent. War Loan as to the bequest of the New South Wales stock, with the result that the bequest is specific and was adeemed by the receipt of the cash payment: *Child* v. *Elsworth* (1). If the contention on behalf of the legatee upon the construction of the will is correct, there was not in existence at the time of the testator's death any War Loan answering the description of the subject-matter of the bequest which the executor could purchase for the purpose of giving effect to the bequest.

CLAUSON J. This is a short will, which raises a point of some interest. [His Lordship then read the will and continued:] At the time the testator made his will he held 1150*l.* Five per Cent. War Loan 1929–1947 and no more. Under the provisions of Part III. of the Finance (No. 2) Act, 1931, the Government were empowered to give the holder of War stock of that description (in the Act called "the Loan") an option of (*a*) making an application, which in the Act is referred to as "a continuance application," in accordance with the provisions of that part of the Act, to have his holding of the Loan continued therein or, if he desired to receive on the redemption date repayment in cash in respect of his holding; (*b*) to make an application, in the Act referred to as "a repayment application." The testator did not make "a continuance application" but made "a repayment application," and received repayment in cash in respect of his holding of 1150*l.* War Loan. Soon after such repayment—namely, on April 23, 1933, the testator died without having altered his will and holding no War Loan whatever at that date.

(1) (1852) 2 D. M. & G. 679.

The first question I have to decide is whether this bequest by the testator to his niece Mrs. Gutheridge of the 1150*l.* War Loan is a specific legacy or is a general legacy of that amount of the stock to be purchased for her by his executor. It is clear that notwithstanding that the testator at the time he made his will did in fact hold that precise amount of the War Loan described in his will, I am bound, in the absence of the possessive pronoun or of some other context indicating that the stock which he intended to give by his will was the very stock of which he was then the holder, to hold that bequest to be a general bequest and not a specific bequest.

It was suggested by counsel for the residuary legatee that the words " standing in my name," which appear in the will immediately after the gift of the 500*l.* New South Wales stock to Marian Gissing, apply to the bequest of the War Loan. It is to be observed that the initial letter " a " in the word " And " immediately preceding the words "to Marian Gissing" is (in the probate of the will) a capital letter, and in my view, that word "And " introduces a separate bequest of the New South Wales stock. In my judgment, the words " now standing in my name " are appended to and qualify the latter of the two legacies only, and have no reference to the bequest of the 1150*l.* Five per Cent. War Loan, which is accordingly a general legacy.

If the view which I take of the construction of the will is the correct one, but there was not in existence at the time of the testator's death stock of the description mentioned in the will which his executor could purchase for the legatee, the legacy must fail : and it has been contended on behalf of the residuary legatee that no such stock as that which is bequeathed by the will was at the date of the testator's death in existence. Turning to the Finance (No. 2) Act, 1931, Part III., I find it provided in effect that if a holder of " the Loan " (i.e. the Five per Cent. War Loan) elects not to apply or fails in due time to apply for repayment in cash, he is treated as making "a continuance application" and thereupon his holding in the Loan is to be continued therein, subject to modifications in rate of interest and terms of repayment.

This seems necessarily to involve that the holding remains a holding in the same stock, though some of the incidents of the stock are modified. If this be so, the executor, in purchasing the existing stock, usually described as Three and a Half per Cent. War Loan, is purchasing a stock which was formerly called, and was, Five per Cent. War Loan and now (though it has a new name and certain modified characteristics) is the same stock as that which the executor was directed by the will to purchase. It is accordingly true to say that a purchase by the executor of stock forming part of the Loan or stock indicated in the will is practicable. In my view the executor's duty is to purchase the proper amount of the Three and a Half per Cent. stock which is held by holders of "the Loan" who have not claimed repayment and is the Five per Cent. War Loan under another name.

I am assisted in arriving at this conclusion by the provisions of s. 14 of the Act, which in effect confer upon trustees who have power to invest in "the Loan" power to continue their holding in and to invest the trust funds in what is now called the Three and a Half per Cent. War Loan. But that section does not apply directly to the present case, because the Finance (No. 2) Act, 1931, came into force during the testator's lifetime, and accordingly the will was not then an operative instrument. The section seems to contemplate powers in existence at the date of the coming into force of the Act.

There will be a declaration that the bequest to the defendant Mrs. Eleanor Gutheridge is a general bequest and that accordingly she is entitled to have purchased for her out of and at the expense of the testator's estate 1150*l.* Three and a Half per Cent. War Loan or to be paid such a sum as will purchase that amount of stock.

Solicitors: *Rooks, Wales, Godwin & Galsworthy, for W. Jackson Hart, Harlow.*

H. C. H.

In re SMALL.

WESTMINSTER BANK *v.* TRUSTEE.

FARWELL
J.

1934

March 26.

[No. 572 of 1927.]

Bankruptcy—Petition for Administration of Insolvent's Estate—Omission to mention or value security in petition and proof—Inadvertence—Order—Amendment—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 4, *sub-s.* 2; 109, *sub-s.* 3; 147, *sub-s.* 1; *Sch. I., r.* 10; *Sch. II., r.* 5 (*as amended by Bankruptcy* (*Amendment*) *Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 7, *s.* 11)), *rr.* 14,17.

Where a petition is presented under s. 130 of the Bankruptcy Act, 1914, and the petitioners have, by inadvertence, omitted, both in the petition and in the proof, to value a security of considerable substance, but greatly below the value of the debt, the Court has jurisdiction to give leave to amend the petition and the proof by valuing the security.

The following statement of the facts is taken in substance from the judgment of Farwell J.

This was a motion by the Westminster Bank who were the petitioning creditors in the administration of the estate of Charles William Small, deceased, by which they asked for an order that they might amend the petition which they had presented asking for the administration of the estate by striking out para. 3 of the petition, which contained an allegation that the applicants had no security, and substituting therefor the statement that they had certain securities, which they sought to value.

The petition was presented on May 24, 1927, by the Bank, and an order for the administration of the estate of the debtor was made on June 23, 1927. A proof, dated July 5, 1927, was put in by the Bank for a sum of 16,000*l.* odd. The petition and the proof were signed by Charles Farrar, who was at that date superintendent of branches of the Bank. It appeared from the petition and the proof that the Bank were unsecured creditors and in that way they petitioned for administration of the estate. But, in fact, the Bank had some security. Under a declaration of trust dated August 15, 1924, the debtor had guaranteed certain moneys to the Bank and had secured them by a charge on various properties, including certain preference shares and rights certificates in Thomas Crow and Sons, Ld. The existence of that charge or deed was brought to the mind or ought to have been brought to the mind of Farrar very shortly before the petition was presented by a letter written by certain solicitors to the Bank in which reference was made to the deed, and there was an acknowledgment of that letter, with a mention of the deed, signed by Farrar and dated May 19, 1927. His Lordship held on the evidence that the omission to state the security, which the Bank in fact held at the time the petition was presented, and in the proof which they lodged, was due wholly to inadvertence, owing to the fact that Farrar completely overlooked and forgot the existence of the security. Shortly after the order had been made it was ascertained that the Bank had some security, and in a letter dated July 20, 1927, Farrar, writing to Mr. Salaman, who was the trustee for the administration of the estate of the deceased debtor, said: "Since the Bank's proof of debt in the above-mentioned matter was sworn by me on the 6th instant, I have ascertained that by an Indenture dated the 15th August, 1924, executed by Mr. Small, certain securities enumerated therein were charged to the Bank. In the circumstances, I shall be glad if you will kindly accept this letter as the Bank's formal notification that it is their intention ultimately to lodge an amended proof." In answer to that the trustee wrote on July 21, 1927, acknowledging the letter and noted that the Bank intended to lodge an amended proof. No application to amend or to lodge an amended proof was made at that time, because serious questions had arisen with regard to the property which had been charged to the Bank by the deceased debtor. Mr. Salaman was the liquidator of Thomas Crow & Sons, Ld., which was in voluntary liquidation, and it appeared that that Company claimed that many of the properties, if not all the properties, and shares which had been pledged to the Bank and had been pledged to other creditors by the deceased debtor himself were not his property, but were the property of the Company and that Small had had no title to those properties or to a large number of them and that accordingly he conveyed no title to his chargee. Under those circumstances, there being very difficult questions to determine as to the rights of Thomas Crow & Sons, Ld., and the various claims on these shares, including the Bank and the estate of the deceased debtor, the parties came to an arrangement under which the various matters were compromised. That arrangement was embodied in the heads of agreement dated June 2, 1928. The parties to it were Mr. Salaman, as the liquidator of Thomas Crow & Sons, Ld.; the Westminster Bank; The Investment Registry, Ld.; Guldager & Lantz; and lastly, Mr. Salaman as trustee in bankruptcy of the estate of the deceased debtor. The effect of that agreement was that the Bank was given a charge on the preference shares and the rights certificates in Thomas Crow & Sons, Ld., the value of which was between 5000*l.* and 6000*l.*

W. N. Stable for the applicants. Sect. 4, sub-s. 2, of the Bankruptcy Act, 1914, deals with what a petitioning creditor who is a secured creditor must do. Sect. 109, sub-s. 3, gives the Court power to amend any written process or proceedings under the Act. Sect. 130 deals with the administration in bankruptcy of a deceased debtor. Sect. 147, sub-s. 1, provides that no formal defect shall invalidate any proceeding in bankruptcy. That covers this case. The Court will not allow these proceedings to be rendered abortive because of an omission made by inadvertence. For the purposes of voting, the applicants are not affected by r. 10 of Sch. I. to the Act, as their omission to value the security arose through inadvertence. Rule 5 of Sch. II., as amended by s. 11 of the Bankruptcy (Amendment) Act, 1926, gives the Court jurisdiction to allow an amendment of the petitioner's affidavit where the omission has been by inadvertence. He also referred to rr. 14 and 17 of Sch. II. In *In re A Debtor* (1) it was held that where a petitioning creditor had inadvertently omitted to mention in his petition a security which he, in fact, held, a receiving order made on the petition was not invalidated by the omission.

He also referred to *In re Button, Ex parte Voss* (2).

J. B. Blagden for the respondent. The respondent does

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(1) [1922] 2 K. B. 109.

(2) [1905] 1 K. B. 602.

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not oppose the application, if the Court is satisfied on the question of inadvertence.

FARWELL J. [after stating the facts :] The first question which I have to determine is whether this petition can be amended. The position appears to be that if I have no jurisdiction to permit the petition to be amended by stating that the petitioning creditor is a secured creditor, and valuing in his proof the amount of the security, the whole of these proceedings, which were commenced by the order dated June 23, 1927, and have been going on ever since, are wholly abortive. That is a result which I should be extremely sorry to bring about and which none of the parties desire should be brought about, but if I have no jurisdiction to accede to this application the fact that the result may be unfortunate cannot give me a jurisdiction which I have not otherwise got. I must therefore consider whether it is possible in a case of this kind for the Court to permit the amendment of the petition. Sect. 4, sub-s. 2, of the Bankruptcy Act, 1914, is in these terms: "If the petitioning creditor is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor." I should also refer to s. 109, sub-s. 3, which provides that "The court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose," and s. 147, sub-s. 1, which also gives the Court power in these terms : "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court." So that the Court appears to be given very wide power both under s. 109 to amend any written process or proceedings and under s. 147 to waive any irregularity. Of course the Court would not permit an amendment, nor would the Court validate invalid proceedings, unless it were satisfied that by so doing no injustice was done to other parties. In a case where a petition is presented against a living person and there is an omission to state that the petitioning creditor is a secured creditor (the petition being presented on the footing that he is not a secured creditor) the debtor has every ground for objecting to the proceedings, if he can show that the value of the security when deducted will reduce the amount of the debt to below 50*l.*, since in that case no petition could be presented, and I apprehend that on any application to amend a petition in this way the Court would not accede to it, unless it was completely satisfied that at the time when the petition was presented the security was of no importance in this sense, that whatever the value of the security the amount of the debt was so much greater as to leave no possible doubt but that there was a petitioning creditor's debt. So far as amending the petition is concerned, I think there is nothing else which assists me in the Act itself, but there are certain rules to which I must refer, the first of which is r. 10 in the first schedule. Those are rules relating to the meetings of creditors, and r. 10 provides: "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence." In this case I have no doubt that the omission to value the security has arisen from inadvertence and, therefore, in my judgment a vote being valid in respect of the whole debt does not in this case amount to a surrender by the Bank of its security. Then in the second schedule to the Act there are rules relating to proof of debt, and r. 5 provides: "The affidavit shall state whether the creditor is or is not a secured creditor." Then r. 14

provides: "Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made bona fide on a mistaken estimate or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order." In this case no dividend has yet been paid. Rule 17 provides: "If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend." It is suggested that r. 17 is to some extent inconsistent with r. 5, but I think the explanation of those two rules is this—and I think they stand together—that if the affidavit does not state that the secured creditor has security then he has to surrender his security to the Official Receiver and as from that date of course he is in the position of an unsecured creditor. But down to that date he is in the position where he has not complied with "the foregoing rules" and any dividend which he may have received down to that date may have to be repaid by him. But again, in this case, there is a saving clause in respect of inadvertence and I am satisfied that there was inadvertence in this case. So that the question really comes to this: in a case of honest mistake, a case where the Court has no doubt whatever that failure to show the security in the petition and in the proof was due to an honest mistake without the smallest intention of gaining any advantage thereby or in any way deceiving anyone in the matter, has the Court jurisdiction to permit the applicants to amend their petition and their proof so as to enable administration of this estate, which has been going on since 1927, to be proceeded with?

I have been referred to one authority and I think it is the only one which really assists me in the matter, the case of *In re A Debtor*. (1) It was a decision of the Court of Appeal and is very like this case except in one particular. That particular may be important. In that case the security which the petitioning creditor had omitted to mention was of

(1) [1922] 2 K. B. 109.

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no value. It was in fact valued by the petitioning creditor at 7*l.* and was said to be of no value. In that case the Court of Appeal held " that a receiving order made upon the petition was not invalidated by the omission, inasmuch as the Court had power to amend the petition, even after the making of the receiving order." Lord Sterndale M.R. refers (1) to a passage from a judgment of Sir George Jessel M.R. in *Moor* v. *Anglo-Italian Bank* (2), and then he himself goes on : " It is said that that dictum goes to this : that if any security be omitted, although of no importance or value, any order or proceeding on the petition is bad. If the learned Master of the Rolls meant his statement to extend to that, I think, with the greatest respect that one must always have for any dictum of Sir George Jessel, that it went too far. But it seems to me that he never intended it to go so far. The question is, suppose there were an omission of something of no value, something not affecting the matter in any way, does that make the receiving order altogether bad ? I think that in a case like that, Sir George Jessel would himself have said ' No, my dictum was never intended to go as far as that.' The Registrar has decided, and I think correctly, that this security is of no value, and I think that if the question had been raised before the receiving order was made, he could have made the necessary amendment." Now if by that judgment Lord Sterndale intended to decide that leave to amend a petition could be only given in a case where the security itself was worthless then, of course, it has no application to the question I am considering, because no one suggests in this case that the preference shares in Crow & Sons, Ld., are not valuable property. But if, on the other hand, what Lord Sterndale meant when he said " an omission of something of no value, something not affecting the matter in any way " was something not affecting the applicant's right to an order in the first instance, because the amount of the debt was greatly in excess of any value which could be properly put upon the security, then this decision appears to me to apply in this case, because here no one questions that the security although of intrinsic value is

(1) [1922] 2 K. B. 109, 111, 112.

(2) (1879) 10 Ch. D. 681, 689.

greatly below the amount of the debt for which the applicants are entitled to prove. In my judgment, when Lord Sterndale in this case referred to an omission of something of no value, he did not mean something which would fetch nothing in pounds, shillings and pence, but he meant, as he explained in the next phrase, something which was not important when one was considering whether the petition was one which could have been presented in the first instance had the proper disclosure been made. I can well appreciate that if there was any sort of doubt as to the amount of the security being less than the amount of the petitioning creditor's debt, then the Court might hesitate long before allowing an amendment, but in the present case there is no possible doubt whatever that the petitioning creditors, even if they had done what they should have done and stated the security and valued it at its proper value, would have been still entitled to the order which was made.

Under those circumstances, in my judgment, I have jurisdiction to accede to this application and I think this is a proper case in which to do so. I am not suggesting that in every case, even where it was shown that there was a sufficient debt to support the petition, it would necessarily be right to make the order I am proposing to make to-day. But having come to the conclusion that I have jurisdiction to make the order and being satisfied under all the circumstances that it would be right to accede to the application, I propose to take that course. That leaves only the question as to what must be valued for the purpose of the security. In my judgment, the true view with regard to that is this, that the Bank must bring in the value of the preference shares, which has now been ascertained. There is nothing else which represents any security for the debt owing by the estate of Small and, therefore, except the shares in the Company, there is no other security which the Bank must value and bring in. Under those circumstances, I propose to make the order which is asked for, but that leaves the question of costs. The whole difficulty in this case was due to the inadvertence of the Bank, perfectly honest inadvertence, but still inadvertence; if their official had not been forgetful, the difficulty would never have arisen. Under those circumstances, as the Bank is seeking the indulgence, the Bank must pay for it. The order will be that the costs of this application must be taxed and paid by the Bank.

Solicitors for the Applicants : *Morley, Shirreff & Co.*
Solicitors for the Respondents : *Ernest Salaman, Wade & Co.*

P. J. B.

In re LANDAU.
Ex parte TRUSTEE.

[No. 424 of 1933.]

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April 27 ; *May* 11.

Bankruptcy—Order for Maintenance by Divorce Court—" Property "—" Salary or Income "—Jurisdiction to order payment of part of maintenance to trustee in bankruptcy for creditors' benefit—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 18, 38 ; *s.* 51, *sub-s.* 2 ; *s.* 167.

By s. 51, sub-s. 2, of the Bankruptcy Act, 1914, " Where a bankrupt is in receipt of a salary or income . . . . the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income . . . . or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct " :—

Held, that the jurisdiction of the Court to make an order under s. 51, sub-s. 2, was not confined to property which vested in the trustee under the Act on an order of adjudication being made ; that maintenance ordered to be paid by the Divorce Court to a bankrupt during the joint lives of herself and her former husband was " income " within the meaning of the sub-section ; and that the Court had jurisdiction to direct that a part of that maintenance (the amount to be fixed by the Registrar) should be paid to the trustee for the benefit of the bankrupt's creditors.

APPEAL from Mr. Registrar Mellor.

In 1925 the debtor, Mrs. Rose Bertha Landau, instituted divorce proceedings against her husband and on December 11, 1925, she obtained a decree nisi. On February 11, 1926, an order was made by consent by the Divorce Court whereby it was ordered (inter alia) that the husband should pay to the debtor the sum of 1800*l.* per annum, free of income tax, during their joint lives from the date of the decree absolute by way of maintenance. The decree absolute was made on June 21, 1926.

On May 24, 1933, a receiving order was made against the debtor and on June 9, 1933, she was adjudicated bankrupt.

From her statement of affairs it appeared that her unsecured liabilities amounted to 6050*l.* 5*s.* 3*d.* and her assets to 5*l.* only.

The trustee in bankruptcy applied to the Registrar under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, for an order for payment over by the bankrupt for the benefit of her creditors in the bankruptcy of such part of her income of 1800*l.* per annum as to the Court might seem just.

The Registrar dismissed the application.

The trustee in bankruptcy appealed. The appeal was heard on April 27 and May 11, 1934.

Oscar Kean for the trustee in bankruptcy.

Tindale Davis for the debtor.

The arguments fully appear from the judgments.

LORD HANWORTH M.R. This is an appeal from the Registrar and it involves the consideration of an interesting point on which we have had an able argument from counsel on both sides. The material facts are these. The receiving order against Rose Bertha Landau was made on May 24, 1933, and she was adjudicated bankrupt on June 9, 1933. Her statement of affairs revealed that her liabilities amounted to 6050*l.* 5*s.* 3*d.* while her assets were 5*l.* and no more. The trustee made an application under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, for an order for the payment over by the bankrupt for the benefit of her creditors in bankruptcy of a part of her income. Now the bankrupt, whose liabilities are considerable and whose assets are practically nil, is in this position: In 1925 she took divorce proceedings against her husband, and on February 11, 1926, the following order was made, an order which we are satisfied was made by consent. "Upon hearing

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the solicitors for the petitioner and respondent and by consent it being agreed that the respondent do pay to the petitioner (*a*) the sum of 1000*l.* forthwith (in addition to and irrespective of the allowance now being made to her) as and by way of alimony pendente lite and (*b*) the sum of 3000*l.* payable immediately after the making of the decree absolute herein "—those were so to speak two independent sums totalling 4000*l.* apart from the sums payable by way of alimony pendente lite—" And the respondent undertaking to secure by deed to the satisfaction of the petitioner for her life in the event of the respondent predeceasing the petitioner after the making of the decree absolute herein (*a*) the annual sum of 1250*l.* per annum free of tax and (*b*) the proceeds of " two policies being for 5000*l.* and 2500*l.* respectively, " It is ordered that the said respondent do pay to the said petitioner the sum of 1800*l.* per annum free of income tax payable during their joint lives as from the date of the decree absolute by way of maintenance," and then two additional yearly sums of 250*l.* each, free of tax, which means (I have not calculated the super tax upon it) that she is in receipt of a gross sum of something more than 2400*l.* per annum. This order, as I have said, was made by consent, and where an order is made by consent, *Maidlow* v. *Maidlow* (1) decides that it is not subject to variation by the Court as it would be if it had been made under the terms of s. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925. This deals with a sum payable during her life and a provision in the case of the death of the husband. The effect of that order made by consent is that she is now in possession of the very substantial income to which I have already referred. It would be a disastrous state of the law if in these circumstances she was able to say that her assets were nil, that nothing could be done to help her creditors to the amount of 6050*l.*, and that she is entitled to receive her income and to leave them in the lurch. Fortunately the law does not stand in that position.

(1) [1914] P. 245.

We have had an able argument presented to us on behalf of the bankrupt by Mr. Tindale Davis, and he raises two points. He says that under the Bankruptcy Act, 1914, what passes to the trustee is, under s. 38, the property of the bankrupt; and it is quite true that there is a section, s. 51, divided into two sub-sections, which enables certain income or certain recurring payments to be made available to the trustee to meet the liabilities in the bankruptcy of the bankrupt. Sect. 51 in the first sub-section deals with the case where the bankrupt is an officer of the army or navy or engaged in the civil service of the Crown where the money that is received by those servants of the Crown is in part enjoyed for the purpose of the maintenance of the position, and in those cases, with the consent of the chief officer of the department under which the pay or salary is enjoyed, a sum may be set aside for the satisfaction of creditors. None of that sub-section applies to the present case. Then sub-s. 2 provides that "Where a bankrupt is in receipt of a salary or income other than as aforesaid," then on the application of the trustee the Court "shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct." Mr. Davis says: That is all very well, but s. 51 is not to be taken out of its setting; it is to be read in the light of the other provisions of the Bankruptcy Act, and s. 38 catalogues the property which passes to the trustee; and, more than that, by s. 167 there is a definition given of "property" which includes "money, goods, things in action, land, and every description of property, whether real or personal . . . . also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined." He says that, reading s. 51 in the light of that definition of "property," and s. 38, unless this income or salary is property within s. 38, no order can be made whether under s. 51, sub-s. 1 or sub-s. 2. Now it is to be observed upon that argument that if that condition to the operation of s. 51 is to prevail it would seem that much of the import of s. 51 is cut away; for, if what is to be dealt with under s. 51 is only such periodical payments as have already under the term "property" become within the control of the trustee, then it would seem that the power given by s. 51 is narrowed and limited to a very small extent. By reason of the authorities, to which I will refer in a moment, I cannot accept the view that s. 51 is controlled and limited by s. 38. The second point made by Mr. Davis is that although s. 51 does deal with certain periodical payments, those periodical payments are cases of salary or income in the nature of salary, and that this sum payable to the wife by the husband under this consent order of the Divorce Court is not either salary or income, but is a sum outside and apart from the categories covered by either of those words.

The authorities deal with both points which have been raised. First of all, let me say that s. 51 is not a new section; it is equivalent to s. 90 of the Bankruptcy Act of 1869, and perhaps the best statement of the sequence of these successive sections is to be found in Lord Atkinson's speech in *Hollinshead* v. *Hazleton.* (1) He first deals with s. 90 of the Act of 1869, which is re-enacted in s. 53, sub-s. 2, of the Bankruptcy Act of 1883 and is again re-enacted in s. 51, sub-s. 2, of the Bankruptcy Act of 1914. It will be observed that I am discarding s. 51, sub-s. 1, which deals with the case of officers or civil servants; I am dealing with the case of periodical payments in the nature of salary or income, but that is the sequence of the statutes which have been passed in 1869, 1883 and 1914, all of which contain, each in its proper place, the ancestor, if I may so call it, of the present s. 51, sub-s. 2. Now it must be borne in mind, first of all, what is meant by salary or income: is there any distinction? Fry L.J., in the passage to which our attention was drawn by Mr. Tindale Davis, attempted a definition of the word "salary." I do not think that that is wholly successful, and it is not, and indeed it is not intended to be, exhaustive.

(1) [1916] 1 A. C. 428, 434.

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Let me refer to an observation made by Jessel M.R. in *Ex parte Huggins* (1), a case which received the approval of the House of Lords, in which he says, referring to s. 90 of the Act of 1869: "The present appellant's income is not a 'salary,' but it is 'income.' The word 'income' is as large a word as can be used." He was there dealing with the case of a retired judge of a Crown Colony, but that observation, with which I respectfully agree, clearly indicates that we have to give not simply an alternative meaning to the words "salary or income" but we have to enlarge the word "salary" by the still larger word "income" which is found in the present sub-s. 2.

Now I will consider *Ex parte Benwell* (2), and it must be remembered that in that case the Court was dealing with the prospective earnings of a professional man known as a "bone-setter"; if he did not work he would not earn fees; if he was ill he would not receive fees. His income was precarious in this sense that it depended, like the income of other professional men, upon his health and his assiduity. As was pointed out by Brett M.R., as he then was, his earnings did not depend on any contract and were not property which passed to the trustee, because they were not earnings which had been stored up; they were future earnings. He says (3): "The Court is empowered to deal with matters of this kind, though they are not comprised in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession. Sect. 90 goes further still, and enables the Court to deal with 'a salary or income other than as aforesaid' of which the bankrupt is in the receipt." Cotton L.J., in dealing with those professional earnings says (4): "In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt, and in such a case a part of it can be set aside for the benefit of his creditors." Those passages explaining s. 90 are really a sufficient guide to a conclusion in the present case.

But the matter does not stop there. In *In re Shine* (5)

(1) (1882) 21 Ch. D. 85, 92.
(2) (1884) 14 Q. B. D. 301.
(3) (1884) 14 Q. B. D. 307.
(4) 14 Q. B. D. 301, 308.
(5) [1892] 1 Q. B. 522.

the question arose whether an order could be made to take the salary of an actor who had obtained an agreement for a term of two years under which he was to be paid a sum of 30*s*. weekly. A discussion on this point again arose, and Lord Esher says (1): "But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy. It follows, to my mind, that the income to which s. 53 refers must be income in the nature of a salary. I cannot doubt that the sum payable to the bankrupt under this agreement is a 'salary,' but at any rate it is 'income.'" Once more Lord Esher is pointing out the distinction between property under s. 38 and the powers given to the Court under s. 53 of the Act of 1883, and Fry L.J. gives his definition with regard to salary and income, in a passage which may be cumulatively added to the indications given in *Ex parte Benwell.* (2)

Now I come lastly to deal with the case of *Hollinshead* v. *Hazleton.* (3) The question there was whether or not a portion of the salary or payment made to an Irish member of Parliament could be taken, and the following observations are made in the speech of Lord Parker of Waddington (4): "Under these circumstances I confess I am unable to see any reason why it should not be held to be salary or income within the 51st section of the [Bankruptcy (Ireland) Amendment] Act of 1872," that is to say, because he finds on consideration that it is a regular payment made to and coming in to the bankrupt. Lord Sumner (5) catalogues the objections made, for instance, that s. 51 of the Act of 1872 is placed in antithesis to the other section and must be referring only to private salaries or incomes, in contradistinction to those derived from the State. Then he adds: "The two sections read together clearly mean that all salaries or incomes not brought in by the first shall be comprehensively brought in by the second. I am not satisfied that this salary has any analogy in fact to those payments,

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(1) [1892] 1 Q. B. 527.
(2) 14 Q. B. D. 301.
(3) [1916] 1 A. C. 428.
(4) Ibid. 460.
(5) Ibid. 463.

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made for the purpose of enabling a certain office of State to be maintained or of retaining the future services of officers, which have been the subject of the decisions cited; but, however this may be, the words of the statute, being clear, import that the Legislature considered that the alienation of part of this salary under an order in bankruptcy was consistent with public policy, a view which is supported by the explicit application of similar provisions in other Bankruptcy Acts to various payments, which probably would be inalienable at common law." Those passages clearly exhibit the wide interpretation to be given to these words in sub-s. 2 of s. 51; and accordingly I find myself in accord with the interpretation given by Farwell J. to these sections in *In re Garrett* (1). Following *In re Shine* (2) and the other case to which I have referred, he comes to the same result which I have now indicated.

It appears to me for these reasons (and I say with some satisfaction I am glad to find that it is so) that the hesitation which Mr. Registrar Mellor felt does not prevail and that an order ought to be made for a sum to be taken from this accruing income of the bankrupt. The quantum must be fixed by the Registrar; we do not deal with that. As was done in the case in the House of Lords, the matter of quantum must go back to the Registrar, but the appeal will be allowed with costs and a direction given that the Registrar will consider what sum ought to be taken from this income receivable by the bankrupt.

SLESSER L.J. I agree that this appeal succeeds.

The first question raised by Mr. Tindale Davis is that on the finding of the learned Registrar that this income secured by the order of the Divorce Court was not the property of the bankrupt so as to vest in the trustee within the operation of s. 18, there is no discretion left in him to make an order under s. 51. I think on consideration that his finding that this income is not property within ss. 18 and 38 may possibly be supported in this sense, that being, as

(1) [1930] 2 Ch. 137.
(2) [1892] 1 Q. B. 522.

it appears to be, an order made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, it may be that it is in appropriate circumstances variable under the proviso on application to the Court. If that is right the observations, particularly those of Scrutton L.J. in *Smith* v. *Smith* (1), to the effect that the Court never loses control of it and can alter and take it away at any time, and the observations made by Fry L.J. in *Harrison* v. *Harrison* (2) (where, speaking of the equivalent section in the Act of 1857 and the Act of 1866 he points out that if it had been for a sum payable under the statute of 1866, which is now equivalent to sub-s. 2 of s. 190 of the Act of 1925, it should not be regarded as the permanent property of the wife, though otherwise if it were payable under the 1857 Act, now sub-s. 1 of s. 190), it may well be, if the order was made under sub-s. 2 of s. 190, that it would not be such property. This appears to be a consent order, but it is made for the joint lives of the parties; and apparently in *Maidlow* v. *Maidlow* (3) the reason why it was there held that the consent order was not variable was because it was an order made for the payment to the wife during her life; and Swinfen Eady L.J. says (4): "It may well be that the parties consented to what would be a proper allowance, having regard to the means of the husband and wife, and it may well be that they determined on a proper amount rebus sic stantibus. If, however, there should be a material change of circumstances after the order has been made even though by consent for the payment of the sum agreed upon for their joint lives, that fact would not prevent an application being subsequently made, if circumstances altered, for the sum to be increased or decreased," but he points out that the reason why in that case it was not possible to entertain such an application for an alteration was because it was not there for the joint lives of the husband and wife but was limited to an order for payment to the wife during her life and, therefore, did not properly fall within the section. In the present case in part the order is for her life and in part for the joint lives and, therefore, it is not very certain exactly what the effect of the order is, but whether this be or whether it be not property within s. 18, in my opinion matters not, because although some of the authorities, notably *Ex parte Huggins* (1), seems to proceed upon the assumption that the property there was property which vested in the trustee, and the Master of the Rolls points out, and Lindley L.J. also, (2) that s. 51 as it now is (he uses the equivalent section at that time) is a modification and qualification of the vesting section, and that the different kinds of property with which they deal vest in the trustee but subject to the modifications and qualifications contained in what is now s. 51, yet nevertheless I am of opinion that later authorities show quite clearly that even in the case of salary or income which is not within ss. 18 and 38, the Court has jurisdiction to make an order under s. 51 where it is salary or income within that section.

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(1) [1923] P. 191, 204.

(2) (1888) 13 P. D. 180, 187.

(3) [1914] P. 245.

(4) Ibid. 249.

The authorities for that proposition begin with *Ex parte Benwell* (3), to which reference has been made, where Brett M.R. makes it quite clear in his observations in that case that property is not limited in the way in which Mr. Tindale Davis argued when one comes to deal with s. 51, but there salary or income may be dealt with under the order, although it does not vest. He says (4): "The Court is empowered to deal with matters of this kind" —that is, pay, half-pay, salary, emolument or pension— "though they are not comprised in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession," and Cotton L.J. (5) speaks to the same effect. That view has been followed in a number of later cases, in *In re Shine* (6) in 1892, also in *In re Saunders* (7), and finally was considered by Farwell J. in a recent case of *In re Garrett* (8), where it was in terms provided that a pension under the Police Pensions

(1) 21 Ch. D. 85.
(2) Ibid. 93.
(3) 14 Q. B. D. 301.
(4) Ibid. 307.
(5) 14 Q. B. D. 308.
(6) [1892] 1 Q. B. 522.
(7) [1895] 2 Q. B. 117, 424.
(8) [1930] 2 Ch. 137.

Act, 1921, s. 14, sub-s. 1, should not pass to any trustee or other person acting on the creditors' behalf; yet nevertheless his Lordship held that that did not prevent the Court from making an order under s. 51, sub-s. 2, for payment of all or part of the pension to the trustees for the creditors' benefit. That was a case where the statute in terms prevented a vesting under s. 18, and yet Farwell J. held that there was power to make an order under s. 51 when the subject-matter was salary or income under that section. In my view the decision of Farwell J., and the reasons given by him and the authorities on which he relies, make it quite clear that the Court has such power; and, as I understand counsel in the present case, that important decision of Farwell J. was not brought before the attention of the learned Registrar. It has been cited to us and, in my opinion, is consistent with all the authorities.

The only question that remains once it is decided that s. 51 does deal with matters other than property which would vest, is whether the subject-matter in this case can properly be described as income. Of that matter I entertain no doubt at all. Moneys paid under a Colonial Act of Parliament, moneys paid under a contract, the salary of a member of Parliament in *Hollinshead* v. *Hazleton* (1) paid under a resolution of the House of Commons, and, as I have said, the pension of a detective inspector in *In re Garrett* (2) paid under this statute have all been held to be income within the meaning of s. 51. I really think it is unarguable that money paid here by order of a competent tribunal for the husband to pay the wife income is other than income within the meaning of the section. Therefore it is unnecessary to decide whether the case is one where the order of the Divorce Court is variable on an application to the Court under sub-s. 1 of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and consequently whether this be or be not property which vests. It all turns on the exact construction of the order, which is, speaking for myself, very difficult to understand. It is immaterial in the present

(1) [1916] 1 A. C. 428.
(2) [1930] 2 Ch. 137.

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case because in any event the payment is income and, therefore, the proper subject of an order in the discretion of the Registrar under s. 51.

ROMER L.J. I entirely agree, and I share the satisfaction expressed by the Master of the Rolls in thinking that we are able to make the order that has been asked for on this appeal; it would be a grave blot on our bankruptcy law if we were precluded from doing so.

Now it was held by Farwell J. in *In re Garrett* (1) that s. 51 of the Bankruptcy Act, 1914, applies to property whether or not vested in the trustee. I entirely agree with him. Farwell J. said, and said truly, that that conclusion was amply justified by the decision of this Court in *In re Shine.* (2) I agree with that too, but I would add this, that even in the absence of authority I should have arrived at the same conclusion without any hesitation whatsoever.

The only other question which remains is whether the payments in question in this case can properly be described as income within the meaning of s. 51, sub-s. 2. I confess that, even after hearing Mr. Tindale Davis's interesting argument, I have not the least idea now why this annual sum paid by the husband to the wife under the direction contained in the order of the Divorce Court is not her income. It is true that Lord Esher in *Ex parte Benwell* (3) said that income in the old section corresponding to s. 51, sub-s. 2, was income ejusdem generis with salary; but, with all respect to that learned judge, I do not think such a statement assists us very much unless the statement goes on to tell us to what genus the salary payment belongs. He did not do so, but in the same case Cotton L.J. did, and in the passage read by the Master of the Rolls (4) the learned Lord Justice said: "In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt." This 1800*l.* a year, free of tax, without any question whatsoever is a definite annual amount coming to the bankrupt. That

(1) [1930] 2 Ch. 137.
(2) [1892] 1 Q. B. 522.
(3) 14 Q. B. D. 301.
(4) Ibid. 308.

being so, it follows from the decision of *Ex parte Benwell* (1), if one wanted any authority for the proposition, that this sum is income within the meaning of s. 51, sub-s. 2.

For these reasons I agree that this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Woolfe & Woolfe.*
Solicitors for respondent: *Reginald Hartley, Royston, Herts.*

W. I. C.

Distinguished. ROBINSON *v.* BAILEY.
[1948] 2 All E.R. 791.

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April 10, 11, 12.

[1932. T. 838.]

Easement—Right of Way—Contiguity to dominant tenement not necessary—Excessive User.

A right of way can validly be made appurtenant to land with which the way has no physical contiguity, but it must be beneficial in respect of the occupation of that land.

Decision of Farwell J. (Ante, p. 190) on this point, reversed.

Ackroyd v. *Smith* (1850) 10 C. B. 164; and *Thorpe* v. *Brumfitt* (1873) L. R. 8 Ch. 650 explained and distinguished.

The plaintiff was the owner of a house in St. Ives, Cornwall, and of a private roadway to the south of the house leading from a highway to the west to garages at the eastern end, which also belonged to the plaintiff. Property which included the roadway and garages had been conveyed to his predecessor in title by N. by a conveyance dated October 15, 1921, which contained a reservation to N. and his successors of a perpetual right of way along the roadway with power to extend it some yards to land further east belonging to N., which was shown on a plan attached to the conveyance and coloured blue. Subsequently N. bought some land north of the blue land and by a deed dated March 22, 1926, a right to extend the roadway to this land was substituted for the right to extend it directly on to the blue land. The result of this was that when the roadway was so extended it could substantially only obtain access to the blue land over an intervening strip of the land to the north of it. The defendant company having purchased the blue land and the land to the north of it built a garage for

(1) 14 Q. B. D. 301.

motor omnibuses on the blue land and proceeded to extend the roadway to the intervening strip and carry it over the strip to the blue land. As the part of the blue land where the garage stood was much higher than the roadway the defendant company, in order to obtain a gradual slope, continued the roadway on the plaintiff's land by means of a concrete ramp, which by the time it reached the five foot wall between the plaintiff's land and the intervening strip was almost the height of the wall. The plaintiff objected strongly to the making of this ramp, which made access to his garages more difficult, and brought an action claiming (1.) that the defendants had no right of way over the roadway for the reason that the right alleged to have been given pertained only to the blue land to which there was no direct access from the roadway; or alternatively (2.) that there had been excessive user of the right (*a*) by reason of the building of the ramp and (*b*) by reason of the user of the roadway for motor buses :—

Held, (1.) that it was sufficient that a right of way should be beneficial in respect of the ownership of the land to which it purported to be made appurtenant, and there need be no physical contiguity between the way and the dominant tenement; but (2.) that there had been excessive user in regard both to the building of the ramp and to the user of the roadway for motor omnibuses.

Decision of Farwell J. (Ante, p. 190) reversed on the first point and affirmed on the second point.

APPEAL from Farwell J. (1)

The plaintiff was the owner of a house known as "Skidden House," in St. Ives, Cornwall. To the south of the house was a private roadway leading from a highway (Skidden Hill) at the western end to garages at the eastern end, and in 1921 Dr. Nicholls was the owner of the roadway and garages and of a property south of the roadway called Penryn and other property to the east of Penryn which was coloured blue on the plan attached to the deed of conveyance next to be referred to and is hereafter called "the blue land." This conveyance, dated October 15, 1921, gave effect to a sale by Dr. Nicholls of Penryn and the roadway and garages to Mrs. Ralfe, and Dr. Nicholls reserved thereby a right of way over the roadway in the following terms: "Excepting and reserving in fee simple unto the vendor his heirs and assigns owner or owners from time to time of all or any part of the vendor's said adjoining property on the east of the said hereditaments (coloured blue on the said plan attached to these presents) and all persons going to or from any part of the last mentioned property a perpetual right of way in common with the purchaser her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the said plan between points marked A and B on the said plan and the right to construct an extension of such road or way between the points marked B and C on the said plan subject nevertheless to the payment by the vendor to the purchaser as from the making by the vendor of such extension of the said road or way of a fair proportion of the expense of maintaining and keeping the whole of the road and the entrance gates thereof between the points A and C in repair." At the date of the conveyance the roadway was some 35 yards in length and was not made up beyond the garages which lay on its north side. If extended for five or six yards it would have impinged directly on the blue land at the point C.

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(1) Ante, p. 190.

Subsequently Dr. Nicholls bought some land north of the blue land, and by a deed dated March 22, 1926, made between Mrs. Ralfe and himself the right to extend the roadway on to the north land was substituted for the original right of extension contained in the deed of October 15, 1921. The result of the change was that the proposed extension would never touch the blue land effectively, there being at most a few inches where the extension and the blue land would be in contact, and that the extension would lead directly to the boundary of the north land where there was a wall 5 feet in height. On the further side of the wall there was a deep sharp depression or gully on the north land across which access could be obtained to the blue land.

In 1927 Mrs. Ralfe died and the plaintiff Dr. Todrick purchased the garages and the roadway subject to the existing right of way. In 1930 the defendant company acquired all the blue land and the land north of it from Dr. Nicholls and erected on the blue land a garage for their motor omnibuses. This garage was made so that the roof formed a departure station for their vehicles by another highway, The Terrace, on the south. To use the garage itself the omnibuses had

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to come by the roadway from Skidden Hill past the plaintiff's garages, but as the defendant company's garage stood on much higher ground, the defendant built as a continuation of the roadway a cemented ramp which rose steeply so that it passed over the wall (already mentioned) at the eastern end of the roadway. From there the ramp was connected to the defendant company's garage by a bridge which continued to rise steeply over the deep depression.

The plaintiff objected strongly to the making of this ramp, which made the driving of cars in and out of his own garages more difficult. The defendant company, however, completed the work, and the plaintiff then brought this action, in which he claimed (1.) that the defendants had no right of way along the roadway for the reason that the right alleged to have been granted, though intended by the deeds to be appurtenant to the blue land, could not be appurtenant to that land because the roadway led on to the land north of the blue land and not directly on to the blue land; (2.) (in the alternative) that if such right existed there had been excessive user of the right in respect of (*a*) the user for motor omnibuses and (*b*) the construction of the ramp, which should be restrained by injunction. The plaintiff also claimed damages for injury to his property caused while the work was in progress. The defendants averred that the conveyance to them of the lands included the right of way, and the right to extend the way on to their own property, and that there has been no excessive user. As regards the alleged damages they paid 10*l.* into Court as being a sufficient discharge.

Farwell J. held on the authority of *Ackroyd* v. *Smith* (1) and *Thorpe* v. *Brumfitt* (2) that a valid easement had not been granted because the right of way as granted did not lead directly to the dominant tenement.

If he was wrong as to this, he held that the use of the right of way by the driving of motor omnibuses up and down it was an excessive user, and that the erection of the ramp was not a proper exercise of the right to extend the way, as it could

(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

have been extended without the erection of a permanent structure of this kind.

The defendants appealed. The appeal was heard on April 10, 11 and 12, 1934.

Spens K.C. and *P. J. Sykes* for the appellants. By the deeds of October 15, 1921, and March 22, 1926, a valid right of way was reserved or granted appurtenant to the blue land. The diversion effected by the second of these deeds did, it is true, cause the right of way as extended substantially to abut not on to the blue land but on to the land north of the blue land. But it is not necessary that a right of way should give direct access to the dominant tenement. Physical contiguity is not necessary provided that the way is for the benefit of the dominant tenement. There is substantial contiguity because the land north of the blue land is in the same ownership as the blue land. It is true that there cannot be an easement in gross: *Rangeley* v. *Midland Ry. Co.* (1), but there are a number of easements which exist without there being contiguity. In each case it is a question whether the easement is so connected with and beneficial to the dominant tenement as to be appurtenant to it. The use of a right of way is not confined to the particular closes on which the way debouches, but the way may be used for access to other closes: *Callard* v. *Beeney.* (2)

[ROMER L.J. The only point decided in that case was what was the dominant tenement.]

Farwell J. based his decision that there must be physical contiguity between the servient and dominant tenements on *Ackroyd* v. *Smith* (3) and *Thorpe* v. *Brumfitt* (4), but neither case gives ground for his decision. *Ackroyd* v. *Smith* (3) is a difficult case to understand, but it does no more than decide that there cannot be an easement in gross and that an easement must be for the benefit of the land to which it is appurtenant. Further, *Thorpe* v. *Brumfitt* (4) decided as a matter of construction that a right of way was appurtenant

(1) (1868) L. R. 3 Ch. 306, 311.
(2) [1930] 1 K. B. 353.
(3) 10 C. B. 164.
(4) L. R. 8 Ch. 650.

to an inn although the right of way only led to a three-cornered strip which, however, was intended to be thrown into the yard of the inn.

[ROMER L.J. Farwell J. seems to have thought the Court would have decided against there being a good easement if the three-cornered strip had not formed part of the yard.]

Yes. It might be difficult to say that a right of way is appurtenant to a close which could only be reached from the way by trespassing; but here the land to the north of the blue land is in the same ownership as the blue land and there is no authority against the view that in such a case the right of way can be appurtenant to the remoter of the two pieces of land. Nor is there any reason apart from authority why the way must lead straight on to the piece of land to which it is appurtenant. It is only necessary that the easement should be for the benefit and enjoyment of the land to which it is made appurtenant.

Next as to the alleged excessive user of the way by using it for motor omnibuses, the points which impressed Farwell J. and caused him to decide against the appellants were: first that the way ran in part close to and above the plaintiff's garden, and that the containing wall was insufficient to prevent the roadway collapsing under the use of heavy vehicles; and secondly, that the gate on to the roadway only gave a 3 inch clearance to the defendants' motor omnibuses. Although the defendants desire to use the roadway for their motor omnibuses, what is really important to them is to establish that they have a right of way over the roadway and they do not desire to press this part of the case unduly.

Lastly, as to the making of the ramp, it is contended that in making the ramp the defendants are making a reasonable use of their right to extend the right of way and make use of it. It cannot be denied that the existence of the ramp makes it more difficult for the plaintiff to take cars in and out of his garage.

[LORD HANWORTH M.R. Are you disputing Farwell J.'s finding of fact that it was possible to extend the right of way without building up the ramp on the plaintiff's land?]

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That is not the true test. The test is whether the defendants have acted reasonably in the exercise of their rights having regard to the land which is the dominant tenement: *Newcomen* v. *Coulson* (1); *Abson* v. *Fenton* (2); Gale on Easements, 11th ed., p. 348. It is contended that the appellants were entitled to start the incline where they did having regard to the fact that some of the land to which the right is appurtenant is on a much higher level, and that having regard to the purpose for which it was intended they were entitled to make the ramp of concrete.

[LORD HANWORTH M.R. referred to *Dand* v. *Kingscote.*] (3)

That case is an example of the same principle and shows that the owner of the dominant tenement is entitled to do on the servient tenement anything reasonably necessary for the exercise of his right.

Evershed K.C. and *Greenland* for the respondent. There is no right of way over the roadway vested in the appellants. The original reservation in the deed of October 15, 1921, was clearly expressed to be appurtenant to the blue land, and on the terms of the deed of March 22, 1926, it is impossible to draw any other inference than that the substituted right thereby granted was intended to be appurtenant to the same land. If so, it is contended that it was sought to do something which was not possible—namely, to make the right of way appurtenant to a tenement on to which it did not directly lead. If the appellants were right the benefit of the right of way would pass on a sale of the blue land to which it is appurtenant, even though the intervening strip remained in different hands so that there was an impassable barrier between the way and the dominant tenement. The position would then be the same as in the example given by Byles J. in *Bailey* v. *Stephens* (4), when he said that there could not be a right of way over land in Kent appurtenant to an estate in Northumberland: see also Gale on Easements, 11th ed., p. 19.

[ROMER L.J. Can there not be a right of way over a succession of fields in different ownership?]

(1) (1877) 5 Ch. D. 133.
(2) (1823) 1 B. & C. 195.
(3) (1840) 6 M. & W. 174.
(4) (1862) 12 C. B. (N. S.) 91.

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That may be, but in such a case the right of way over any field other than that contiguous to the dominant tenement would be appurtenant to the easement and not to the dominant tenement. A right of way, though usually appurtenant to land, may be appurtenant to incorporeal hereditaments.

[Lord Hanworth M.R. referred to *Attorney-General* v. *Horner* (*No.* 2) (1), and said that the test whether an easement was appurtenant to land was whether it was beneficial to that land, as stated in *Bailey* v. *Stephens*.] (2)

Such an easement as is alleged in this case could not pass on the assignment of the blue land without more. In *Thorpe* v. *Brumfitt* (3) the Court escaped from that difficulty by holding as a matter of construction that the dominant tenement was the inn on the ground that the triangular piece of land to which it was really appurtenant was part of the yard of the inn. In that case Mellish L.J. said it was determined in *Ackroyd* v. *Smith* (4) that if the land to which it was sought to make a right of way appurtenant was not at the end of the way the right of way was in gross. That is directly applicable to the present case. Here an attempt has been made to make a right of way appurtenant to one piece of land when it in fact leads to another piece of land. There is therefore no valid grant of the easement. Whatever view the Court may take on this technical point, the substantial question is whether the appellants are entitled to take motor-omnibuses along the way and up the ramp.

[*Spens K.C.* The appellants do not press their claim to take motor-omnibuses along this road.]

As regards the ramp the appellants clearly had no power to make this, and if the respondent fails on the contention that there is no right of way at all a mandatory injunction ought to be granted for its removal. Farwell J. would have granted this but for his decision that there was no right of way vested in the appellants.

Spens K.C. replied.

(1) [1913] 2 Ch. 140, 196.
(2) 12 C. B. (N. S.) 91, 112.
(3) L. R. 8 Ch. 650.
(4) 10 C. B. 164.

LORD HANWORTH M.R. In this case the plaintiff brought his action to restrain the defendants in the user which they had made of a right of way. He alleged that the defendants in fact had not a right of way at all; and further complained that the defendants had constructed upon the land over which the right of way, if any, passed, a ramp which they were not entitled to construct or to maintain; and that they used the right of way for the purpose of heavy omnibuses or, as put by them, in their defence, in connection with the transport service owned and operated by them.

The action was brought before Farwell J., who came to the conclusion that the defendants possessed no right of way. That was sufficient to decide the action in favour of the plaintiff, but the learned judge gave his opinion upon the other points, and in particular upon the point that the structure which had been set up by the defendants upon the land over which the right of way passed, would not, had there been a right of way such as was alleged, have been within the right so given to the defendants, and would in itself have been a trespass. He granted an injunction in the terms stated in his judgment, and from his decision the appeal is brought to the Court by the defendants.

It is brought, first of all, for the purpose of establishing that the defendants have a right of way, and that Farwell J. misinterpreted the law in relation to the right of way which the defendants claim, and next that they had the right to make use of their right of way by building up this structure upon the surface over which the right of way extended; but Mr. Spens has not pressed the claim to use this right of way and structure for heavy motor vehicles or omnibuses in connection with the defendants' motor transport service.

The facts are fully stated in the judgment of Farwell J., and I need not re-state them, except to the extent necessary to make this judgment plain. Farwell J. at the opening of his judgment states: "The plaintiff is the owner in fee simple of a house known as 'Skidden House' in St. Ives in the county of Cornwall and of certain land adjoining that house. Included in the land so owned to the south of the house there is a roadway over which the defendants claim to have a right of way, and this action is concerned with the defendants' alleged rights over it. The roadway is of some 35 or 40 yards in length; it leads at the western end out of a highway in St. Ives where there is a gateway with stone pillars on each side and gates which open. The width of the opening at the gateway itself when the gates are opened is 7 feet 9 inches, but the roadway is wider, being 9 feet in width for the most part."

I leave that statement of the configuration of the ground for the purpose of turning to the two documents under which the right of way was given to the defendants. In the first of the documents, being a conveyance made on October 15, 1921, there was a reservation of a right of way by Dr. Nicholls, the vendor, who was selling certain land to Elizabeth Ralfe. Dr. Nicholls was the predecessor in title of the present defendants. The reservation there made was [his Lordship read the reservation]. It will be observed that that reservation is for "all persons going to or from any part of the last mentioned property"—that is the property "coloured blue on the . . . . plan attached to these presents." Afterwards there was a modification of that right, because the actual points over which the extension of the road was to pass was modified, and the first right of extension was surrendered by a deed of March 22, 1926. The new grant was in the following terms: "Elizabeth Ralfe as Beneficial Owner hereby grants unto the said John Michael Nicholls his heirs and assigns owner or owners from time to time of all or any part of his said adjoining property on the east of Penwyn (coloured blue on the said plan number 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan number 1) over across and along the piece of land coloured green on the plan number 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereby surrendered." That is to say the course of that right of way was slightly modified, and instead of being, as it originally was, a right which passed straight along from west to east, and after the point B slightly southward, it continued the same right of way over the points A to B, but after B it passed in a westerly and somewhat more northerly direction. It should be, however, observed that the right is reserved in connection with and for the purpose of, to use the exact words of the grant, the "owner or owners from time to time of all or any part of his said adjoining property on the east of Penwyn (coloured blue on the said plan . . . .)." The land coloured blue has passed to the defendants, and the plaintiff is now the successor in title of Mrs. Ralfe.

It is said that there is in fact no piece of land coloured blue which is contiguous to the land over which the right of way has been granted, with the result that the right of way in passing eastwards does not debouch on any part of the blue land. There is therefore a complete severance between the blue land and the land over which the grant of the right of way has been made. On the other hand, it is right to point out that by certain measurements of the maps before us which may have a sound foundation it is possible that a small portion of the blue land is contiguous to the land over which the right of way has been granted. I think that Farwell J. did not intend to make a definite decision as to the precise position of the blue land in relation to the land over which the right of way was granted, because he says (1): "According to the defendants the roadway does impinge upon the blue land to the extent of some three feet: on the other hand, according to the plaintiff's evidence, it does not impinge upon the blue land at all. But whichever may be the true view (and that must depend upon the evidence which has been given as to the measurements to be found on these various plans) this is perfectly plain, that the roadway as provided for in the deed of March 22, 1926, for all practical purposes leads on to the land north of the blue land and not on to the blue land. If the defendants are right in saying that to the extent of some few feet it impinges

(1) Ante, p. 197.

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upon the blue land, then it may be possible for a person on foot, or even possibly on a bicycle, exercising great care, to avoid getting on to any other land than the blue land when he leaves the roadway. But for all practical purposes, the only land to which the roadway leads is the land *north* of the blue land, and it is not necessary for me to decide which of the various witnesses who have given their views as to these measurements is right." In other words he holds that for practical passage of carts and horses and persons there is no contiguity between the blue land and the land over which the grant of the right of way is made, and for that reason he held that there was no right of way.

I am unable to go as far as that. It is not suggested that there is any authority which lays down the proposition that in order that there should be a right of way the dominant land which is to enjoy the right of way must be contiguous to the land over which the right of way is to be enjoyed. I do not find that this proposition is established by *Ackroyd* v. *Smith* (1), a case which is not easy to understand but which, I think, is properly and fully explained by Mellish L.J. in *Thorpe* v. *Brumfitt* (2) when he said that the words "for all purposes" were interpreted in the judgment of the Court then delivered by Cresswell J. as being so wide as to include purposes that had no connection with the occupation of the piece of ground to which the right of way purported to be attached. Cresswell J. had said (3): "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee." I do not think it is necessary to examine that case further, because it does not really assist us in the question we have to determine. *Thorpe* v. *Brumfitt* (2) is of interest in that James L.J. in considering whether or not a right of way had been obtained allowed himself to consider (4) the grant of a right of way to a triangular piece of ground as reasonably meaning "a right of way between the highway and the yard of the inn of which the grantees were the owners, the triangular piece of ground not being intended to be held as a separate property, but being granted only for the purpose of being thrown into the yard, so as to make a more convenient boundary line between the properties of the grantor and the grantees." Thus, he puts a construction on the terms used in the grant there which was effective for the purpose of establishing the right of way intended to be granted. However, I do not consider it necessary to found my judgment upon either of those two cases.

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(1) 10 C. B. 164.
(2) L. R. 8 Ch. 650.
(3) 10 C. B. 188.
(4) L. R. 8 Ch. 656.

Dealing with the point upon which Farwell J. founded himself, namely, that there must be contiguity between the dominant and the servient tenements for the purpose of a right of way, I find no such principle established in any of the cases. I think it would be unfortunate if I endeavoured to lay down a rule which might cause much difficulty having regard to the multifarious rights of way to be found in the country. I think the true test which we have to apply is that which is broadly stated in Gale on Easements, 11th ed., p. 19: "So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit."

That proposition is established by an examination of three cases. The first is the case of *Bailey* v. *Stephens* (1), in which Willes J. says (2): "I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it, and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect, that, at common law, a benefit of that description went into whosesoever hands the land might pass." Equally Byles J. says (3) after referring to *Ackroyd* v. *Smith* (4), and after referring to a right of way: "It must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it

(1) 12 C. B. (N. S.) 91.
(2) Ibid. 112.
(3) 12 C. B. (N. S.) 115.
(4) 10 C. B. 164.

must inhere in the estate." The passages that I have just quoted were referred to with approval by Hamilton L.J., as he then was, in *Attorney-General* v. *Horner* (*No.* 2) (1) when he said (2): "Now it is well settled that an easement appurtenant must be for the benefit of the inheritance to which it is appurtenant. It must be 'beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person': per Willes J., *Bailey* v. *Stephens* (3): 'It must have some natural connection with the estate as being for its benefit': per Byles J." That seems to give the real test, which does not require physical contiguity. Applying that test to the present case the only consideration is whether or not there can be a better enjoyment of the blue land by virtue of this right of way, whether the right of way is beneficial in respect of the ownership of the land.

Now, as Romer L.J. has pointed out, supposing there is not physical contiguity, yet if the owner of the blue land can exercise the right of way that he has secured by this reservation why should he not be entitled to exercise it? The fact that he may have some difficulty in obtaining access to some intervening portion ought not to militate against his enjoyment of a right which is of such a nature that it is beneficial to the blue land which he occupies, and has a natural connection with the property as being for its benefit in the sense that it provides a speedier and easier access to the highway called Skidden Hill, to which he may wish to pass. Upon those authorities, therefore, I come to the conclusion that Farwell J. has not advised himself correctly in holding that by reason of the absence of physical contiguity there cannot be a valid grant of the right of way, and I come to the conclusion that the words in the two deeds to which I have referred are such as reserved to the defendants' predecessor in title a right of way, as he was able to exercise it, over the land which is a part of the tenement belonging to the plaintiff.

Now comes the next question: Are the defendants entitled to do what they have done with this right of way? It is suggested that they ought not to be tied down to the original user of the right of way, such as walking along the road over which they exercise the right, or passing along it with horse or carriage, but that a development should be allowed, such as was given effect to with limitations in *Dand* v. *Kingscote.* (1) I desire, however, to point out with regard to that case that while it was held that there could be what is called a railway —I should prefer to call it a tramway—on which tubs could pass, there was also given a right of compensation to the plaintiff in respect of the excessive user of the land such as, for instance, putting ditches and fences to the railway which do not appear to have been found necessary. Therefore *Dand* v. *Kingscote* (1) does not justify any and every user of the right of way. Nor is that justification to be found in *Abson* v. *Fenton.* (2) As was pointed out by Lord Tenterden, as he afterwards was, the question will be: "Whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another." The test he applies is: "to exclude all wanton, capricious, and causeless injury to the owners of the allotments; and, on the other hand, to admit of an exercise of the right reserved by the statute in such a manner as may make the right beneficial to the lord."

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(1) [1913] 2 Ch. 140.
(2) Ibid. 196.
(3) 12 C. B. (N. S.) 112.

In the present case, having to balance the rights of both parties, the owner of the dominant and the owner of the servient tenements, I find that the owner of the servient tenement has had a ramp put up on the surface of the land which belongs to him and that it circumscribes the area available to him for the purpose of washing his car or of getting his car out of the garage to the extent that it has so shortened the area in front of the garage as to make it difficult for him to use the garage freely and to take his car in and out of it with any freedom. In that sense there has been a distinct limitation imposed upon the plaintiff of his rights in respect of the garage and land which he owns. The

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(1) 6 M. & W. 174.

(2) 1 B. & C. 195, 203.

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defendants have for their own purposes put up upon the land belonging to the plaintiff this ramp in order to use the gradient which leads up to the garage upon their own ground. If the gradient had been steeper it would have been possible to commence the ramp at the point where the wall intersects the two properties of the plaintiff and the defendants, but rather than do that they have put up this structure without bearing in mind the rights of the plaintiff over the land. It is an exercise of the right of way which is not merely a development such as occurred in the case of *Dand* v. *Kingscote* (1), but an intrusion on the rights and property of the plaintiff. In those circumstances there ought to be a mandatory injunction to restrain the defendants from doing what they have done and to compel them to remove the ramp which they have superimposed upon the plaintiff's land to their own advantage and to the disadvantage of the plaintiff.

Then comes the last question that Mr. Spens does not press—namely, whether the right of way included a right to take the omnibuses through the gateway and along the right of way. Having regard to the fact that the omnibuses when they pass through the gateway would only have a margin of one and a half inches on either side, it is quite plain that the right of way was never intended for such vehicles, and I think Mr. Spens was quite right in not pressing for his clients a claim to a right to use the right of way in such a manner as to introduce these heavy motor vehicles on to it for the purpose of the defendants' transport services.

The result is that the appeal fails. We differ from Farwell J. as to the question whether there is a valid right of way. We agree with him on the second point on which he would if necessary have made an order in favour of the plaintiff—namely, as to the imposition of this ramp upon the right of way for the purposes of the omnibuses. The result is that the appeal fails because it does not prevent the plaintiff from succeeding in the action.

ROMER L.J. I have nothing to add to what has been said

(1) 6 M. & W. 174.

by the Master of the Rolls upon the question of the excessive user by the defendants of their right of way by running motor omnibuses over the road. Nor have I anything to add to what he said upon the excessive exercise by the defendants in constructing the ramp, of their right of continuing the roadway from the point marked B on the plan. Farwell J. decided both those questions in favour of the plaintiff and in my opinion rightly so decided them.

But the learned judge also decided in favour of the plaintiff the question whether the defendants had any right of way at all over the plaintiff's land, and as we are differing from the learned judge upon that question, I should like, out of the respect that I entertain for his opinion, especially upon questions of real property law, to state as shortly as may be my reasons for so differing.

The question turns in the first place upon the conveyance of March 22, 1926, and it is necessary to construe that document. It is made between Elizabeth Ralfe of the first part and Dr. Nicholls, who was the predecessor in title of the defendants, of the other part. It begins by a recital of an indenture of conveyance of October 15, 1921, made between Dr. Nicholls of the one part and Elizabeth Ralfe of the other part, by virtue of which the premises now belonging to the plaintiff were conveyed by Dr. Nicholls to Mrs. Ralfe in fee simple, excepting and reserving to Dr. Nicholls "his heirs and assigns owner or owners from time to time of all or any part of his adjoining property on the east of Penwyn (coloured blue on the plan No. 1) and all persons going to or from any part of the last mentioned property a perpetual right of way for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the plan No. 1 between the points marked thereon A and B and the right to construct an extension of the said road or way between the points marked thereon B and C." Pausing there, it cannot be, and is not contended, that that did not except in favour of Dr. Nicholls a right of way appurtenant to his land coloured blue. Then the deed goes on to recite that the extension of the private road or way between the points B and C on the plan No. 1 had not yet been made by Dr. Nicholls. The next recital is this: "and whereas the said John Michael Nicholls has agreed with the said Elizabeth Ralfe to surrender and release the right to construct such extended roadway between the points marked B and C on the said plan No. 1 on the said Elizabeth Ralfe granting to him the substituted right of way hereinafter contained and for the consideration hereinafter expressed."

The witnessing part of the deed consists of three clauses. By the first clause Dr. Nicholls, as beneficial owner, surrendered and released to Mrs. Ralfe the excepted and reserved right to construct an extension of the road between the points marked B and C and the easement of way thereover. That right is described in the clause as being "appurtenant to his said adjoining property on the east of Penwyn." By the second operative clause, in pursuance of the agreement Mrs. Ralfe, as beneficial owner, granted to Dr. Nicholls, "his heirs and assigns owner or owners from time to time of all or any part of his said adjoining property on the east of Penwyn (coloured blue on the said plan No. 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan No. 1) over across and along the piece of land coloured green on the plan No. 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereby surrendered and released."

The right of way so conferred must be a right of way either for purposes solely connected with and for the benefit of the land coloured blue, or for the purposes of and connected with all the land of Dr. Nicholls to the east of Penwyn; or thirdly, for all purposes whether connected or not with the land coloured blue.

In my opinion on the true construction of this deed what it purports to grant to Dr. Nicholls is a right of way for all purposes over the land of the plaintiff between the points mentioned for the purposes and for the benefit of the land coloured blue, and no other land. My reasons for arriving at that conclusion are these. To start with, there is no other property of Dr. Nicholls referred to in the agreement than the land coloured blue. In the next place, the right of way given him is expressly given in substitution for the pre-existing right of way which undoubtedly was a right of way appurtenant to the land coloured blue. In the third place, it is in terms granted to Dr. Nicholls " his heirs and assigns owner or owners from time to time of all or any part of the said adjoining property on the east of Penwyn (coloured blue on the said plan . . . .)"

That being, in my opinion, the proper construction of the deed, the question arises whether the right of way so granted was a right of way appurtenant to the land coloured blue so as to pass with that land to the defendants when the land coloured blue was conveyed to them. It is said on the part of the plaintiff, that it was not appurtenant to that land and could not pass therefore to the defendants, because, it is said, the road over which the right had been granted does not directly lead, except to an immaterial extent, on to the land coloured blue, so that any one using the road for the purpose of going to the land coloured blue must pass over some other land that in fact did belong to Dr. Nicholls and now belongs to the defendants. It is said that there cannot be an easement of a way appurtenant to land unless the way ends upon the alleged dominant tenement or, in other words, that the dominant tenement must be one of the termini of the roads in question. For myself I know of no authority in support of that proposition. The essential qualities of an easement are stated, and in my opinion stated accurately, in Gale on Easements, 11th ed., p. 19: " According to the civil law it was necessary that a servitude should be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such

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benefit were one merely personal to him. For the same reason no servitude could exist unless the dominant and servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other. So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit. Thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland." No such qualification as is contended for here on the part of the plaintiff is to be found in that passage. The reason why the right of way over land in Kent cannot be appurtenant to an estate in Northumberland is not because the way in Kent does not and cannot end on the estate in Northumberland, but because such a right of way in Kent cannot be any benefit to the owner of the estate in Northumberland as such owner. For myself I can see no reason why there should not be a good easement of land to do acts on or over the servient tenement when and so often as the owner of the dominant tenement can get there to perform them.

I do not know whether on the part of the plaintiff it is suggested that this qualification is one that attaches only to an easement of way. Certainly a man as owner of a tenement may have a right, and frequently does have a right, by way of easement, to do an act upon land of another person which is situated some little distance away from the dominant tenement. Supposing that that right be a right to maintain some erection such as a sign upon a servient tenement, I see no reason why that should not be a good easement merely because to get to the servient tenement the owner of the dominant tenement has to go over land which does not belong to him, if and so long as he can get a right or permission to go to the servient tenement. Take the case again of a way. I see no reason myself why the owner of a tenement abutting on a highway should not have a good easement of way over the land on the opposite side, or indeed, on the same side of the highway, merely because in order to get there the owner of the dominant tenement has to walk over or along the highway. He has a right to walk along the highway and therefore is in a position to get to the servient tenement and there exercise his right.

The learned judge thought that he found authority to support the proposition for which the plaintiff was contending in two cases. One was *Ackroyd* v. *Smith* (1) and the other *Thorpe* v. *Brumfitt.* (2) In those circumstances it becomes necessary, I think, to consider in some little detail what exactly it was that those cases decided. *Ackroyd* v. *Smith* (1) was an action for trespass and the defendants were accused of trespassing on some plot of land that was in fact set out as a road. Whether it was a made-up road or not, I do not know. The defendants sought to justify the alleged trespass by the existence of a right of way over the land in question which they said was vested in them as the successors in title to one John Smith. Now the right of way was created on the occasion of a conveyance to John Smith of a piece of land of which, at the time of the alleged trespass, the defendants were owners and occupiers, and the right of way was created in these terms. There was granted to John Smith " his heirs and assigns that he and they respectively, being owner and occupiers, for the time being "—of the said close of land that was being conveyed to John Smith— " and all other persons having occasion to resort thereto, should have the right and privilege of passing and repassing, with or without horses, cattle, carts and carriages, for all purposes in, over, along, and through "—the said road. The defendants pleaded this right of way in justification, and there was a demurrer to the plea. It was alleged in the first place that the right of way which was granted in the terms that I have just read was a right of way for all purposes and was not confined to purposes connected with the land which had been conveyed to John Smith at the time the right of way purported to have been granted. That was a question of construction of the deed. Now the defendants unfortunately in their plea of justification had stated that at the time of the alleged trespass they were using the road for their own purposes and did not say that those purposes were connected

(1) 10 C. B. 164.

(2) L. R. 8

with the close of land which had been conveyed to John Smith and which they held as successors in title to him. They were therefore in this dilemma. If, according to the true construction of the deed, the way was granted for purposes solely connected with the close of land, they had not stated that they were using the piece of land for those purposes. If, on the other hand, according to its true construction the right of way granted was a right to use the road for all purposes, whether connected or unconnected with the particular close, then it was contended on the part of the plaintiff that that was an easement unknown to the law, that is to say, it was what is sometimes called an easement in gross and was not therefore an easement appurtenant to the close of land in question and had not passed to the defendants. That those were the questions that arose and were decided in that case, is made perfectly plain in the judgment of the Court delivered by Cresswell J. The learned judge said (1): "The plaintiff then demurred, assigning for causes, amongst others, that the plea did not show that the trespasses justified were committed in going to or from the premises conveyed, or that they were in any way connected with the enjoyment of those premises. In support of the demurrer, it was contended, first, that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification pleaded, and, secondly, that, if the grant was more ample, and gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land, and therefore the defendants could not claim it under a conveyance of the land, with the appurtenances. On the other hand, it was contended that the right created by deed might be assigned by deed, together with the land, and was large enough to maintain the justification pleaded. Upon consideration, we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer. If the right conferred by the deed set out, was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But, if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land,"—and here he added some words which have since given rise to some considerable difficulty—"and this, we think, is the true construction of it, it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it." He then goes on to decide that such a way as that cannot be made appurtenant to land and *Ackroyd* v. *Smith* (1) is the leading authority in support of that proposition. I doubt, however, whether at the present day any judge would hold that the right granted in that case was as a matter of construction a grant of a right of way for all purposes whether connected or unconnected with the land in question.

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(1) 10 C. B. 186.

In the later case of *Thorpe* v. *Brumfitt* (2) the plaintiff was a lessee of a certain inn and a yard attached to it at Bradford, and he claimed as the lessee of that inn and yard to have a right of way over a path connecting the yard with a highway, the path being the land of the defendant, and he brought an action against the defendant for obstructing that way and so interfering with his right of way. The right of way had been created on the occasion of a conveyance to the plaintiff's lessors by the owner of the land over which the way ran of a triangular piece of land which later on was thrown into, and at the time of the conveyance was intended to be thrown into, the yard, but there was no reference to the purposes for which the right of way was granted except that it was to be used "for all purposes." These are the terms in which the grant was made. There was a grant of "rights of way and passage at all times hereafter and for all purposes through, over and along a certain road, passage, or gateway"—and that is described and is said to be delineated on the plan—"and also the right, power, license, and privilege of granting similar rights of roadway and passage over the same road, passage, or gateway to any other person or persons whomsoever." There was no reference in the grant of a right of way to any particular land for the benefit of which the right was to be exercised, and that being so the defendants sought to justify themselves by calling in aid *Ackroyd* v. *Smith* (1) as an authority for the proposition that wherever you find a grant of a way for all purposes, that is too large to enable the right of way to be appurtenant to a particular piece of land. But James L.J., as a matter of construction, held that it was a grant of a way to the yard inasmuch as the piece of land which had been conveyed on the occasion when the right of way was granted had been thrown into the yard and was all along intended, as was acknowledged by the parties, to be thrown into the yard. Mellish L.J., as a question of construction, held that it was a right of way for purposes connected solely with the enjoyment of the triangular piece of land which was at the end of the way in question. It was unnecessary, of course, for them to decide which of those two constructions should prevail. The fact that they differed, did not affect the decision in the case, because it was not a question of the extent of the user of the way to which the plaintiff might have been entitled, but a question whether the defendants were entitled to obstruct the plaintiff in the use of his way, whether he was using it for the purpose of getting only to the triangular piece, or for the purpose of going beyond the triangular piece to the rest of the yard. That however has really nothing to do with the point that we have to decide here. It is true that James L.J. in dealing with *Ackroyd* v. *Smith* (1), said (2): "In the present case the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed; it is therefore a grant of a right of way to and from that triangular piece of ground." Mellish L.J. said (3): "In *Ackroyd* v. *Smith* (1), though it was not absolutely necessary to the decision to give any opinion whether the right of way was in gross or not, the Court gave an opinion

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(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

(1) 10 C. B. 164.
(2) L. R. 8 Ch. 655.
(3) Ibid. 657.

that it was in gross. But in that case the close to which it was sought to make the way appendant was not at the end of the road." He then quotes from the judgment of Cresswell J., and that passage was laid hold of, I think, by Mr. Evershed in his argument in the present case as being an authority for the proposition that if the land to which it is sought to make a right of way appurtenant is not at the end of the road in question, there cannot be an easement over the road appurtenant to the land. What Mellish L.J. was doing, and what James L.J. had done in a passage occurring just before the passage I read was to point out what it was that *Ackroyd* v. *Smith* (1) had really decided and why they were not going to adopt the same construction of the grant of the way in *Thorpe* v. *Brumfitt* (2), as had been adopted in regard to the grant in *Ackroyd* v. *Smith.* (1) They are only seeking to distinguish the decision in *Ackroyd* v. *Smith* (1) from the decision that they arrived at in *Thorpe* v. *Brumfitt* (2) on the construction of the deed which created the right of way in each case.

Therefore, with all deference to the learned judge, I cannot regard either of those authorities as in any way justifying the proposition of law which was accepted by the learned judge, that there cannot be a right of way over a road appurtenant to a dominant tenement unless the dominant tenement is one of the termini of that road.

For these reasons, therefore, I agree that although the appeal fails, yet the order of Farwell J. should be discharged, and another order made which will deal solely with the rights of the plaintiff on the plea of excessive user.

MAUGHAM L.J. I am of the same opinion, and having regard to the fact that the point on which the Court differs from Farwell J. is one of considerable importance and to the respect I have for his opinion on such a matter, I think it well to state the reasons in some detail.

The decision in the Court below is reported in the Law Reports (3), and there I find the facts well and clearly stated

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(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

(3) Ante, p. 190.

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both at the beginning of the report, and, so far as necessary, in the judgment of the learned judge. It is therefore unnecessary to add anything with regard to those facts.

Coming to the material deeds, the first deed is dated October 15, 1921, and is a conveyance made between John Michael Nicholls of the one part and Mrs. Elizabeth Ralfe of the other part. Certain premises were conveyed to Mrs. Ralfe with the exception and reservation of a right of way. [His Lordship read the exception and reservation.]

It is not in dispute and never has been in dispute that that was a good reservation to the vendor which operated, of course, by way of grant to him of a right of way over the site in question coloured yellow on the plan between the points marked A and B, the right to construct a further extension between the points marked B and C and then to enjoy the right of way over the whole piece of land A, B and C. On March 22, 1926, a document was executed between the same Mrs. Ralfe and John Michael Nicholls intended (amongst other things) to divert the extension of the right of way given between the points marked B and C on the plan to which I have already referred. Accordingly Dr. Nicholls released the right to construct the extension of the private road between the points B and C so as to extinguish that right, and in consideration of the release Mrs. Ralfe granted to Dr. Nicholls, " his heirs and assigns owner or owners from time to time of all or any part of his said adjoining property on the east of Penwyn (coloured blue on the said plan No. 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan No. 1) over across and along the piece of land coloured green on the plan No. 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereof surrendered." It is expressed in the widest possible form, including the words " at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereby surrendered."

I do not think it is necessary to state the reasons which lead to the conclusion that this substituted right of way, including the right of way between A and B which, I suppose, is technically arrived at under the earlier conveyance, is appurtenant to what I have called for shortness the blue land, that is the land coloured blue on the plan in the indenture of 1921. My brother Romer has expressed reasons for that with which I entirely agree. But assuming that that is so, the plaintiff's contention is that this deed had what I cannot help thinking is the surprising result of destroying Dr. Nicholls' right of way altogether for the reason that the extension of the right of way which was to go along the piece of land coloured green, does not connect directly with the blue land.

In order to appreciate the nature of that contention it is necessary to state one further deed which was executed before the deed of March 23, 1926. The old intended extension of the right of way, that is to say that conferred in October, 1921, led directly on to the blue land. The person entitled to the right, Dr. Nicholls, on May 29, 1925, acquired from a Mr. George Care a piece of land to the north of the blue land which I will call for convenience the connecting strip. It was a small piece of land bought for the sum of 45*l.* and is roughly 25 feet long north to south and 18 feet wide—an irregular strip. The position, therefore, after the deed of March 22, 1926, was that Dr. Nicholls could come along the land coloured green on the plan annexed to that deed, and when he came along to the end of the green he came to his own property, most of it, no doubt, the connecting strip, over which he could go to the blue land. Here then arises for consideration the contention on behalf of the plaintiff which met with favour in the Court below. It is pointed out that while the alleged easement is said to be appurtenant to the blue land, it is impossible to drive a car or an omnibus along the way over the green land so as to reach the blue land without going for a considerable part of the journey

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over the connecting strip; and it is said that no right of way can be granted as appurtenant to a tenement unless the right of way leads right up to the dominant tenement. In my opinion, there are two answers to that contention.

The first is an answer on the facts. It is not, in my opinion, correct to say that no part of the site of the right of way or its extension will be contiguous with the land coloured blue. The facts as to the precise position where the piece of land coloured green reaches the wall which was the boundary between the two premises are difficult to ascertain with accuracy. The defendants contend that there is an overlap of some three feet and that to that extent the right of way is contiguous to the blue land; and the plaintiff does not, I think, deny, or at any rate his counsel did not before us deny, that there might be an overlap of nine inches; and having carefully listened to the evidence read before us on this question, I am of opinion that there is an overlap of at least nine inches; that is to say, the side of the right of way does join on to the blue land to the extent of nine inches. If that is so, I ask myself why that is not amply sufficient to support an easement of way leading up to the dominant tenement. There could be a right of way 30 feet wide to a dominant tenement where there is, we will say, a narrow door or a window or a fence with a gap in it through which goods might be passed, and such a right is obviously advantageous to the dominant tenement. It seems to me a complete mistake to suppose that the strip coloured green over which the way was to be made and vehicles were to pass must, at the end of the strip, coincide to the extent of the whole width of the piece of land coloured green, with the dominant tenement.

In my opinion, even assuming that it is necessary for a way granted in circumstances such as we have here to reach the dominant tenement, it is quite sufficient if it reaches it to the extent of a few inches, and the easement is quite valid because the right of way can then be used for getting to the premises in question. You can take a cart along a right of way and not the less because you cannot drive the

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cart through the wall at the end of the right of way. So far as regards the portion of the right of way which is not co-terminous with the blue land, there is nothing to prevent a person with a right of way from walking or driving in a zig-zag direction or at right angles at the end of the right of way; in other words, he may get quite properly to the end of the green strip and when he gets there he can cross the green strip if the land on the other side is his, and none the less because that is not part of the dominant tenement. Accordingly, I think on the facts the plaintiff is unable to succeed in showing that there was no right of way subsisting after the deed of 1926.

I should, however, be very unwilling to leave the matter simply to be determined on this ground, especially as I agree that the facts with regard to the precise overlap, if any, of the right of way on the land coloured blue are somewhat obscure. I proceed to consider the matter on the footing that there was no overlap, that is to say that the green strip is not, for even an inch or two, contiguous with the blue land. Supposing that is so, is the easement necessarily bad? The proposition is that a private right of way arising by grant or prescription must lead directly up to the land of the dominant tenement. I do not myself think it can be stated in any terms less wide than that. Now excluding the two cases of *Ackroyd* v. *Smith* (1) and *Thorpe* v. *Brumfitt* (2), with regard to which I will say a word in a moment, no authority whatever has been cited in support of that proposition. No dictum has been found in the judgment of any judge, no statement to that effect in any work of authority, and as my brother Romer has pointed out, the proposition must be confined to easements of way, for it certainly is not a true proposition as regards other easements. I think it was admitted that it must be confined to rights of way, but in any case, the various examples of easements which are not contiguous contained in the judgment of Fry J. in *Moody* v. *Steggles* (3), are sufficient to establish that it is not a general proposition with regard to all easements. Why then should we be asked to say that it is correct in relation to easements of way unless constrained so to hold by authority? For my part, I am unable to see any ground for such a decision. In my opinion it is quite contrary to the common understanding of the law with regard to rights of way. Take a house with its front door on the highway and a field opposite not belonging to the owner of the house. Can the owner of the house not acquire by grant a right of way across the field opposite to, say, a highway or a railway station? I believe the universal opinion is that such a way can be granted. Many other instances could be given, and I will give one more. Can an owner of land not acquire a right of way leading to his tenement over two fields belonging to different owners? I should imagine that such a right of way is constantly being acquired, and I can see no reason in common law why such an easement should not be acquired; but I am unable to see how, if the proposition to its full extent is to be accepted, such a right could be properly granted, because the way over the further field would not lead to the dominant tenement, but to another right of way which might be, of course, of a precarious character.

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(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

(3) (1879) 12 Ch. D. 261.

I was going to deal at some length with the two cases of *Ackroyd* v. *Smith* (1) and *Thorpe* v. *Brumfitt* (2), but I find that Romer L.J. has said nearly all that I should have desired to say with regard to those two cases. I confess that I think *Ackroyd* v. *Smith* (1) requires very careful attention before it can properly be appreciated, and it certainly is not, as the Lord Justice pointed out, an authority for the view that a grant of a right of way for all purposes not leading to the dominant premises is necessarily bad as being a grant in gross. Further, I think that in order to appreciate the question of construction involved it is necessary to bear in mind what Mellish L.J. said in *Thorpe* v. *Brumfitt* (3), that in *Ackroyd* v. *Smith* (1) the close to which it was sought to make the way appendant was not at the end of the road. I think that appears

(1) 10 C. B. 164.

(2) L. R. 8 Ch. 650.

(3) Ibid. 657.

from a careful consideration of the very prolix pleadings on which the case of *Ackroyd* v. *Smith* (1) is decided. I propose to say no more about either of those cases beyond saying that I agree with what has been said with regard to them; and for myself I will add that I am unable to see how there is anything in either of those two cases which supports the general proposition that a right of way can only be granted if the way leads right up to the dominant tenement.

I find, however, a qualification with regard to the rights of way which can be granted in connection with a dominant tenement not, however, limited to rights of way but relating to all easements. The proposition is to be found in Gale on Easements, 11th ed., p. 19, and has been referred to by both my brethren. It is that the easement must be connected with the enjoyment of the dominant tenement. A similar proposition is to be found in a work which was first published over sixty years ago, namely, Goddard on Easements, 8th ed., p. 20. After referring to *Ackroyd* v. *Smith* (1) and a number of other cases, the learned author says: "The principle must therefore be accepted that there must not only be a dominant and a servient tenement to support an easement, but that the easement must be beneficial to the dominant tenement." I see no reason whatever for expanding that qualification as to the characteristics of an easement in the way suggested. I think it would be a great pity if the powers of owners of land to grant rights of way to their neighbours were limited in the manner contended for. The easement must not, of course, be an easement in gross; it must be appurtenant to the dominant tenement, but if it is connected with the enjoyment of that tenement, that is sufficient to make it a legal easement which will pass upon a conveyance of the dominant tenement as being appurtenant to it.

For those reasons, which are only reasons given in addition to those already expressed, I cannot agree with the judgment of the learned judge that the right of way here was destroyed as the result of the deed of March 22, 1926. The form of the order in that respect, therefore, requires some qualification.

(1) 10 C. B. 164.

There were two other points on which the learned judge expressed an opinion, and with regard to those I need say very little. The first point was in reference to the driving of motor omnibuses and other heavy motor-cars such as lorries along the right of way. Farwell J. dealt with that in his judgment. (1) Mr. Spens, in my opinion quite rightly, upon consideration, came to the conclusion that he could not contend that the view of Farwell J. in that respect was wrong. I think, therefore, I need say no more upon that.

Finally, there came the question whether the ramp constructed by the defendants along the extension of the right of way granted by the deed of March 22, 1926, was a reasonable exercise of the power conferred by that deed. The facts are stated by the learned judge, who says (2): "They built a roadway which rises sharply so that it goes over the wall which was the boundary between the land north of the blue land and the plaintiff's land. That roadway is built up on a cemented ramp and is a solid construction, and it is no doubt from the point of view of the defendants a useful and desirable way of getting access to their own land for motor omnibuses." It may be added that the ramp rises some five feet before it reaches the land of the defendants with a vertical concrete side to it which makes the turning of a motor-car by the plaintiff a matter of considerable difficulty and very likely a matter of danger. Farwell J. found, upon the evidence, that it was not the fact that there was no other method of exercising the right of extending the way. He said (2): "I am satisfied on the evidence before me that a way could have been made, not necessarily suitable for motor omnibuses, but a way suitable for ordinary vehicles which would not have entailed the erection of a permanent structure on the plaintiff's land. It might have been an expensive matter and one involving considerable alterations to the defendants' own land to provide a way by which a vehicle, having got to the boundary, could get safely down to the land of the defendants, but there is no evidence which would justify me in coming to the conclusion that the method

(1) Ante, pp. 205–207.

(2) Ante, p. 199.

adopted by the defendants was the only practical method of extending the roadway." I see no reason whatever to doubt that the learned judge was right in that conclusion. A deed inter partes such as we have to deal with here in construing the extent of the right conferred by the deed of March 22, 1926, is very different from an Inclosure Act, and I merely observe in passing that the case of *Newcomen* v. *Coulson* (1) is, I think, distinguishable, or rather is not really in point in considering the construction of the power conferred by the deed which we have to consider. The erection of the ramp, in my opinion, was not justified and was a trespass.

Appeal dismissed.
Order varied.

Solicitors: *Clifford-Turner Hopton & Lawrence; Robbins, Olivey & Lake, for Boase & Bennetts, Penzance.*

H. C. G.

HAWKES AND SON (LONDON), LIMITED *v.* PARAMOUNT FILM SERVICE, LIMITED.

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March 6, 20.
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April 26, 30.

[1933. H. 3112.]

Copyright—Musical composition—Sound Film—News reel—Photograph of outdoor function—Band music recorded and reproduced by film—Infringement of copyright—" Substantial part "—" Fair dealing with any work for the purposes of . . . . newspaper summary "—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-ss.* 1 (i.), 2; *ss.* 8, 19.

The owners of the copyright in a musical composition sued two companies for infringement. The representatives of one of the companies had made, developed and printed, and the other company had distributed to cinema theatres, where it was exhibited, a sound film known as a news reel, recording a moving picture of the scene at the public opening of a new school, together with the accompanying sounds, including the playing by a band of part of the musical composition in question. The defendants denied that this was an infringement:—

Held, on the above facts (reversing the decision of Eve J.), that there had been an actionable infringement of the plaintiffs' copyright, as there had been a reproduction of a " substantial part " of the musical

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(1) 5 Ch. D. 133.

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composition within s. 1, sub-s. 2, of the Copyright Act, 1911, that the acts of the defendants did not constitute a "fair dealing" with the work within s. 2, sub-s. 1 (i.), and that damage had been proved.

Witness Action.

The plaintiffs were the owners of the copyright in a musical composition entitled "Colonel Bogey" and alleged that the second defendants, the Olympic Kinematograph Laboratories, Ld., had manufactured and sold and/or hired and delivered to the first defendants, the Paramount Film Service, Ld., a sound film which infringed their copyright in the music, and that the first defendants had caused the same to be hired out to and exhibited in various cinema theatres, and they claimed an injunction. Both defendants denied that they had infringed the said copyright.

The sound film in question was admittedly hired out and distributed by the first defendants under the title "British Paramount News No. 253." A portion of this film reproduced the scene, together with the accompanying sound, of the opening of the Royal Hospital School at Holbrook, Suffolk, by the Prince of Wales, on July 25, 1933. The sound recorded on the film included some 20 bars of the military march "Colonel Bogey" as played by the school band. The film was taken by a representative of the Olympic Kinematograph Laboratories, Ld., and afterwards developed and printed at their works, and hired out to and distributed by Paramount Film Service, Ld. There was evidence that at all the theatres where the film was exhibited in July and August, 1933, fees had been paid for performing rights in the music. The defendants pleaded that the sound recorded could not be reproduced except as an integral part of the news film.

They denied that any substantial part of the musical work was mechanically reproduced by the film. They denied that what they had done was any infringement of the plaintiffs' copyright, and relied on s. 2, sub-s. 1 (i.), of the Copyright Act, 1911.

Hon. S. O. Henn Collins K.C. and *K. E. Shelley* for the plaintiffs. The second defendants, Olympic Kinematograph

Laboratories, Ld., have caused to be made and have hired out to the first defendants Paramount Film Service, Ld., a sound film consisting of a news reel entitled "British Paramount News No. 253," which reproduces a substantial part of the musical work "Colonel Bogey" the copyright of which belongs to the plaintiffs, and both defendants refuse to pay any fees for so doing. The film reproduced the scene at the opening of the Royal Hospital School at Holbrook, Suffolk, by the Prince of Wales on July 25, 1933, when the boys of the school marched past while a band played the principal subject of "Colonel Bogey." The picture was recorded on nine-tenths of the film, and the sound on the remaining tenth. On the evidence we submit that the defendants have infringed the plaintiffs' copyright, and we ask for an injunction, and damages.

F. K. Archer K.C. and *E. J. Macgillivray* for the defendants. This march has been performed in 417 cinema theatres with the consent of the author of the composition and on payment of fees to the plaintiffs. The only question is whether the making of the film is unauthorized. These news films are in effect a pictorial form of newspaper. The case comes within s. 2, sub-s. 1 (i.), under which any fair dealing for the purposes of private study, research, criticism, review, or newspaper summary is not to constitute an infringement of copyright. The sound film is an audible and pictorial newspaper summary. It would be possible to produce the picture without reproducing the sound, which could be shut off, but it would be very difficult to reproduce the sound heard without projecting the picture.

Further, the defendants have not taken a substantial part of the music. They admit that they have no right to make an ordinary sound film of "Colonel Bogey," but it is quite reasonable to reproduce a small part of the music on a news reel. The film reproduces not only the music, but every other sound heard, the marching past and cheers from the assembled spectators. If the plaintiffs' contention is right it would be impossible to make a sound film of any part of the Lord Mayor's Show without the risk of infringing some person's copyright. No one could say that there is any animus furandi in making a sound and picture film of such an event as the opening of a new school. The fact that a portion of "Colonel Bogey" occurs in the course of the film makes no extra profit for the defendants, nor does it inflict any appreciable injury to the plaintiffs' rights: *Hanfstaengl* v. *Newnes* (1), per Lindley L.J; *Scott* v. *Stanford* (2); *Chatterton* v. *Cave.* (3)

The news film cannot be said to reproduce a substantial part of the musical work. There was no choice by the defendants. They reproduced the scene and the music as played by the band with all other noises, and it was mere chance that the band was playing a piece of copyright music. The second defendants, at least, were "not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright": Copyright Act, 1911, s. 2, sub-s. 3; see also s. 8. The plaintiffs cannot prove any damage.

Hon. S. O. Henn Collins K.C. in reply. The defendants have, on the evidence, reproduced the plaintiffs' copyright music without permission, and it is submitted that there is no defence to the action. Copyright means the right of reproduction in any material form whatever. In *Bradbury, Agnew & Co.* v. *Day* (4) and *Hanfstaengl* v. *Newnes* (5) the question was whether the use which was made of what was taken was unfair. A sound film is quite different from a newspaper; such a device did not exist in 1911.

Cur. adv. vult.

March 20. EVE J. The plaintiffs, who are the owners of the copyright in a musical work entitled "Colonel Bogey," claim an injunction to restrain the defendants from infringing their copyright, delivery up of all infringing materials and all cinematograph sound films, or other contrivances in the possession or under the control of the defendants, that infringe the copyright, and damages. The nature of the alleged infringement is disclosed in para. 2 of the statement of claim, wherein it is alleged that the second named defendants have

(1) [1894] 3 Ch. 109, 128.
(2) (1867) L. R. 3 Eq. 718.
(3) (1878) 3 App. Cas. 483, 503.
(4) (1916) 32 Times L. R. 349.
(5) [1894] 3 Ch. 109.

manufactured and sold and/or hired and delivered to the first named defendants, and the first named defendants have, by way of trade, distributed, let on hire, exhibited and authorized the exhibition of a talking film, being a contrivance by which a substantial part of the said musical work could be mechanically reproduced.

The defendants admit that the film, identified by the title "British Paramount News No. 253," was manufactured by the second named defendants and by them delivered to the first named, by whom it was, by way of trade, distributed and let on hire for reward, and that the first named defendants thereby authorized the exhibition of the said film at the cinematograph theatres named in para. 3 of the statement of claim, and that the said film was in fact exhibited at the said cinematograph theatres during the months of July and August, 1933. They deny that any substantial part of the said musical work can be mechanically reproduced by the said film or by any part thereof.

Before dealing further with the pleadings, it will be well to explain how the film came into existence. On July 25, 1933, the Prince of Wales opened the Royal Hospital School at Holbrook in Suffolk. The ceremony aroused considerable interest in the locality, and a large number of persons attended. Amongst them was a representative of the second named defendants, equipped with a camera containing a sensitized film, capable of photographing what was to be seen, and, by a contemporaneous operation, recording what was to be heard. The picture is photographed on something like nine-tenths of the film, and the sound is recorded on the remaining one-tenth thereof. At one stage of the proceedings a quota of noise was contributed for the space of some 20 seconds by a boys' band, which was playing the march "Colonel Bogey," and in due course the sound was recorded, with the other noises, on the sound recording part of the film. When the photographing is complete, the film is removed to the laboratory and developed; at that stage, it is a negative, and of no use for display. The next stage is to convert it into a positive, which is the film. To make use of the film, a projection apparatus is required, with an arc lamp, and to reproduce the sound, another

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projection apparatus is required. For the reproduction of picture and sound together, the two projecting apparatuses must be kept moving together.

In this particular case, picture and sound have both been reproduced as they were seen and heard, and accordingly, the defendants plead, by way of further defence, that if any part of the said musical work can be mechanically reproduced by the said film, it cannot be so reproduced otherwise than as an integral part of a news reel, by means of which the ceremony connected with the opening of the Royal Hospital School may be mechanically reproduced.

The question I have to determine is whether, on the above facts, there has been an actionable infringement of the plaintiffs' copyright. If so, it would seem to involve this: that the introduction into the babel of sound inseparable from any pageantry, of a few bars of some more or less appropriate piece of music, would constitute an infringement calculated seriously to prejudice the rights of those whose aim is to reproduce the spectacle as a whole. I cannot bring myself to believe that this could be right.

In this particular case I am of opinion (1.) that no substantial part of the work has been reproduced. It appears that the whole work would take a band about four minutes to play, and that the part recorded on the news reel takes 20 seconds. (2.) If I am wrong in applying this measure for determining the relative substantiality of the part taken, and that which was not taken, that the acts of the two defendants constitute a fair dealing with the work, under s. 2, sub-s. 1 (i.), of the Act. (3.) That it is impossible that what has been done can inflict any substantial injury on the plaintiffs' monopoly, or invade any market of the plaintiffs, actual or problematic; and (4.) that it has not been proved that the first named defendants had knowledge that the work was being infringed. Accordingly, I dismiss the action with costs.

H. L. L.

C. A.

The plaintiffs appealed. The appeal was heard on April 26 and 30, 1934.

Hon. S. O. Henn Collins K.C. and *K. E. Shelley* for the appellants. Both the defendants have committed an infringement of the appellants' copyright by including a performance of a substantial part of the musical work called " Colonel Bogey " in a news reel made by the second defendants and hired out to and produced by the first defendants. The infringement was under s. 2, sub-s. 1, of the Copyright Act, 1911, in doing an act, the monopoly to do which was by s. 1, sub-s. 2 (*d*), part of the copyright. It was argued before Eve J. that the defendants were protected by the proviso to s. 2, sub-s. 1, which provides that " any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary " shall not constitute an infringement. It is clear, however, that the production of " Colonel Bogey " in the news reel falls within no part of the category. It was also said and Eve J. found that the news reel reproduced no substantial part of the march. From a musical point of view this is incorrect. The first subject of the work, which contained 32 bars, was produced practically in its entirety. This is the part of the march by which it is chiefly known and the cause of its popularity.

[*Archer K.C.* said that he conceded that a substantial part of the piece of music was reproduced.]

In the circumstances there was clear infringement.

Archer K.C. and *E. J. Macgillivray* for the respondents. Although it is admitted that the news reel cannot be called a newspaper summary it is something of much the same nature, and the matters specified in the proviso to s. 2, sub-s. 1, are merely examples of "fair dealing," and this case falls within the general principle involved in the proviso. The reproduction of part of " Colonel Bogey " was merely incidental to a sound film which as an item of news gave the opening of the Royal Hospital School by the Prince of Wales. When considered in relation to the whole film the part occupied by " Colonel Bogey " was negligible. It cannot be said in such a case that a contrivance has been made by which the musical work could be reproduced as such.

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[LORD HANWORTH M.R. It is said that the sound part of the film could be given by itself.]

That is so, but the only right that the respondents claim is to continue to reproduce the sound picture as a whole. It is a case where the reproduction was made alio intuitu, the real object of this part of the news reel being to indicate what happened when the Prince of Wales opened the school. The purpose of the reproduction is of vital importance for the purpose of ascertaining whether there has been an infringement: *Bradbury* v. *Hotten* (1); *Scott* v. *Stanford* (2); *Chatterton* v. *Cave*. (3)

Hanfstaengl v. *Empire Palace* (4) was quite a different case, but Lindley L.J. there states the principle on which he bases his decision. The cases there cited were all before the Copyright Act, 1911, but they offer a guide to the construction of that Act.

[They also referred to *Boosey* v. *Whight*. (5)]

Hon. S. O. Henn Collins K.C. in reply.

[LORD HANWORTH M.R. What do you say as to the first defendants who have distributed the films ?]

We are content to have our remedy against the second defendants.

[He was not called upon further.]

LORD HANWORTH M.R. This action is brought by the plaintiffs, who confessedly are the owners of the copyright in a musical work entitled "Colonel Bogey." It is a musical march. The action is brought against two defendants—against the first-named defendants, the Paramount Film Service, Ld., because they distributed in the way of trade and authorized in that sense the exhibition of the film, and it is said that they took part in that sense in what led to an infringement of the copyright by the second defendants, the Olympic Kinematograph Laboratories, Ld. These second defendants are those whose action has in fact set the plaintiffs in motion. What was done was this. These defendants—and when I am speaking of "these defendants" I mean the Olympic Kinematograph Laboratories, Ld.—went down on a very interesting occasion to Holbrook in Suffolk, the place to which the Naval School has been removed from Greenwich, when the opening of the school was honoured by the presence of His Royal Highness the Prince of Wales, and on that occasion took a film showing the arrival of His Royal Highness, his proceeding to the grounds of the school, and then a march past which took place before him, when the boys marched past to the tune of "Colonel Bogey." Other things are shown, such as, for instance, the school itself and the buildings, and there are other incidents of the arrival of His Royal Highness when cheering takes place, and finally at his departure, when the boys of the school rest their arms on the rigging and give him a rousing cheer from the main arm.

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(1) (1872) L. R. 8 Ex. 1.

(2) L. R. 3 Eq. 718, 722.

(3) 3 App. Cas. 483, 503.

(4) [1894] 3 Ch. 109, 128.

(5) [1900] 1 Ch. 122.

The plaintiffs say, and it is not disputed, that they are the owners of the copyright in this musical march "Colonel Bogey," and that in the course of this film this march has been played and reproduced; it is reproduced to the extent, I think, of some 28 or more bars, and it takes something like 50 seconds to one minute to reproduce. On the other hand, the defendants say that it is quite true that this march has been reproduced in the film, but it was reproduced only as incidental to the other features of the day which were portrayed in this film; that it was entirely subordinate to the general purpose of the film; and that in any case the march, and this part of the march, played a subsidiary part, and only a subsidiary part, in this picture film; and they suggest that it would be a hampering of trade, if they were restrained from this kind of reproduction, more especially because the film itself is what is called a news film, that is to say, a film which is taken of some incidents of a day's proceedings, and afterwards shown at a picture theatre for a short time, and that the value of the film depends upon its rapid production in the course of the next few days.

We have to look at the Copyright Act, 1911, to see whether the plaintiffs are entitled to the injunction which they seek against the Olympic Kinematograph Laboratories, Ld. With regard to their claim against the distributing company, that company is, as I understand, in close association with the second defendants, and Mr. Archer says that it matters very little what is the precise position of the Paramount Film Service, Ld., in the matter, because there could be no separation of costs, and any order against the Olympic Kinematograph Laboratories, Ld., would practically carry with it the subsidiary service rendered in distribution by the first-named defendants. Now first of all let me point out that there is no question here, on the evidence before us, of the attitude of the plaintiffs being one under which they wish to place a serious or real impediment on the work that is being done, and legitimately done, by the defendants. They do not at all intend or desire to hamper trade. All that they say is this: that if this reproduction of a copyright musical march is allowed or is sought by the defendants, then, on a payment, that licence can be granted. I do not think there is much in the plea of the defendants that the rapidity with which they have to reproduce these new films makes it difficult, or indeed impossible, for them to obtain a licence from the owners of the musical copyright. Some system could no doubt be arranged whereby, if there is a possibility of some infringement of copyright, there could be a licence applicable to the occasion, so as to avoid any damage to the plaintiffs or other owners of copyright.

I turn therefore simply to look at the statute, and I bear in mind two or three points which have been rightly called to our attention. It is quite plain from what Lindley L.J. said in *Hanfstaengl* v. *Empire Palace* (1) that we have to consider the statute upon broad lines; to bear in mind the necessity for the protection of authors whether of musical or of literary compositions. The Acts have to be construed with reference to that purpose, and they are not to be made the instruments of oppression and extortion. On the other hand, as the learned Lord Justice says, "the intention of an infringer is immaterial," and as

(1) [1894] 3 Ch. 109, 128.

Slesser L.J. has pointed out, Parker J. said in *Weatherby & Sons* v. *International Horse Agency and Exchange, Ld.* (1), that the right of the owner of a copyright is not determined or measured by the amount of actual damage to him by reason of the infringement; copyright is a right of property, and he is entitled to come to the Court for the protection of that property, even though he does not show or prove actual damage. Lindley L.J. says this (2): "Guided by the foregoing considerations . . . . I ask myself whether these sketches are such copies of the plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures." That was his test.

Now applying all that has been culled from the various authorities to which our attention has been drawn, I refer to the Act to see what are the rights of the plaintiffs and the corresponding rights by way of defence of the defendants. There is no doubt that, the plaintiffs are the owners of the copyright in this march, and that means under sub-s. 2 of s. 1 of the Copyright Act, 1911, that they have the sole right to produce or reproduce the work or any substantial part thereof, and to perform it; and that includes also the sole right to make any record by means of which the work may be mechanically performed or delivered, and to authorize any such acts as aforesaid. It is plain that the second defendants have made a record, by the contrivance of which the "Colonel Bogey" march may be mechanically performed, and they have in so doing infringed the right of the owner of the copyright. But it is said, first, that there is no substantial part of this musical work taken, and that the cases show that we must look into the question of the degree and what was the nature of the reproduction. In one case to which Lindley L.J. refers, he points out that in that case a worsted work copy of an engraving was held not to be an infringement of the copyright therein. On the other hand, photographs of pictures have been held to infringe the copyright, although there is a vast difference between a photographic reproduction and the picture itself. Therefore, when one deals with the word "substantial," it is quite right to consider whether or not the amount of the musical march that is taken is so slender that it would be impossible to recognize it.

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(1) [1910] 2 Ch. 297, 305.

(2) [1894] 3 Ch. 109, 129.

In order that we might give the defendants every chance, we decided to go and see this film reproduced, and we have done so this morning, and it appeared plain to us that there is an amount taken which would be recognized by any person. We have evidence before us which must not be overlooked—evidence "that certain small exhibitors do, if they can get hold of news films, use the sound track for the purpose of what we call a non-synchronous interlude, and that sort of thing," and "in the case of some of the smaller theatres, it was probably just a means of getting over the coming in and going out of the people; and they do not worry very much about the value of that sound.

Having considered and heard this film, I am quite satisfied that the quantum that is taken is substantial, and although it might be difficult, and although it may be uncertain whether it will be ever used again, we must not neglect the evidence that a substantial part of the musical copyright could be reproduced apart from the actual picture film.

Then I turn also to see what is the justification the defendants can rely upon. First they say that under s. 2, sub-s. 1: "the following acts shall not constitute an infringement of copyright:—(i.) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary." I cannot hold that any of those words are apt to cover what has been done by the defendants. It was suggested by Mr. Macgillivray that in a sense a news film was a newspaper, but the collocation of the words "criticism, review, or newspaper summary" clearly points to the review or to notices of books which appear in newspapers, and not to anything of the nature that was done in the present case. I cannot hold that this was a review or a newspaper summary.

If that be so, we have to consider sub-s. 2 of the same section: "Copyright in a work shall also be deemed to be infringed by any person who—(*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire ; or (*b*) distributes either for the purposes of trade . . . . or (*c*) by way of trade exhibits in public . . . . any work which to his knowledge infringes copyright. . . . ." These are the directions of the statute as to what shall be deemed to infringe copyright. In the present case it appears quite plain that there has been a reproduction of a portion of this march—a substantial portion, as I have already held—a work which the defendants did know to be copyright, and that they have, for the purposes of trade, exhibited or dealt with it within the meaning of sub-s. 2.

Under these circumstances it appears to me that the plaintiffs are entitled to the relief that they ask against the second defendants. We need not deal further with the first defendants. The appeal must be allowed with costs both here and below.

SLESSER L.J. I am of the same opinion. The learned judge has come to the conclusion that no substantial part of the work has been reproduced. He continues : " It appears that the whole work would take a band about four minutes to play, and that the part recorded on the news reel takes 20 seconds." The learned judge, no doubt, in coming to the conclusion that no substantial part of the film has been reproduced, was not unmindful of the history of the words " substantial part " which appear in the Copyright Act, 1911, and which are an essential ingredient if the plaintiffs are to succeed or have judgment found in their favour. Those words, as Mr. Macgillivray has pointed out, had not appeared before that time in any statute. but they are words which are derived from several of the cases in which learned judges have used either those particular words or language similar. It is to be observed that in the old Copyright Act (5 & 6 Vict. c. 45), under which *Bradbury* v. *Hotten* (1) and *Chatterton* v. *Cave* (2) and other cases fell to be decided, there is no such distinction. It is there provided by s. 15 "That if any person shall in any part of the British dominions . . . . print or cause to be printed either for sale or exportation any book in which there shall be subsisting copyright": no distinction is there made between the whole of the book and a substantial part of it, and, of course, the literal reading of those words would of necessity have produced absurdities, and the learned judges in several cases were at pains to point out that where the statute says "any book," it means any essential, vital or substantial part of the book as words, all of which appear in different judgments. The matter is put perhaps most clearly, or as clearly as anywhere else, by Lord Hatherley in *Chatterton* v. *Cave* (1), where he says: "if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought." The learned Lord in his speech there uses the words "neither substantial nor material," and the words "a fair use only be made," in apposition, and it is in that sense, I think, that before the Act of 1911 the matter has to be considered.

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(1) L. R. 8 Ex. 1.

(2) 3 App. Cas. 483.

Mr. Archer is perfectly right when he points out that the authorities indicate that other matters beyond mere quantity may and have to be looked at; indeed it is a criticism, I think, if I may respectfully make it, of the judgment in this case, that the only ground on which the learned judge held that no substantial part had been reproduced was that the whole work would take not more than four minutes to play, and the part recorded on the news reel took 20 seconds. I agree with my Lord that this reproduction is clearly a substantial part of "Colonel Bogey," looked at from any point of view, whether it be quantity, quality, or occasion. Any one hearing it would know that it was the march called "Colonel Bogey," and though it may be that it was not very prolonged in its reproduction, it is clearly, in my view, a substantial, a vital, and an essential part which is there reproduced. That being so, it is clear to my mind that a fair use has not been made of it; that is to say, there has been appropriated

(1) 3 App. Cas. 483, 492.

and published in a form which will or may materially injure the copyright, that in which the plaintiffs have a proprietary right. As is pointed out by Sir W. Page Wood V.-C. in *Scott* v. *Stanford* (1): " If, in effect, the great bulk of the plaintiff's publication—a large and vital portion of his work and labour—has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects." So far, therefore, it is clear that a substantial part has been appropriated; or to use the language before the Act of 1911 I should have held in accordance with the authorities that there had not been a fair use made of the matter.

But it is further pointed by Mr. Archer that there is added to the protection given to a defendant, this: not only that he may say in an appropriate case that a substantial part has not been taken, but he may go on, if he can, under s. 2, sub-s. 1, to say that he falls within the proviso, as to fair dealing because sub-s. 1 of s. 2 says: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." Of course, in a particular case where there has not been a substantial part taken, not a fair user within the meaning of s. 1, that proviso does not arise; but assuming that it does arise, then the learned judge in this case has held, alternatively, this: "If I am wrong in applying this measure"—that is to say, the measure of "substantial part"—"for determining the relative substantiality of the part taken, and that which was not taken, that the acts of the two defendants constitute" (he holds) "a fair dealing with the work, under s. 2, sub-s. 1 (i.), of the Act."

In my view it is quite impossible to apply that proviso to

(1) L. R. 3 Eq. 718, 723.

this case. The only material part of the proviso here would be "any fair dealing with any work for the purposes of newspaper summary." It is impossible to say that this reproduction in a film of sound can be a newspaper summary. I think this proviso must be dealt with strictly, and when it says "newspaper summary" it means newspaper summary and nothing else. Now here there is neither a summary nor a newspaper, and it is impossible, I think, to hold that this case comes within that protection.

For these reasons I agree that the appeal must be allowed.

ROMER L.J. I, too, have come to the same conclusion, and I have done so with some regret, because I cannot think that the defendants, in doing what they have done, have caused any real damage to the plaintiffs, and because our decision will no doubt somewhat hamper the defendants in their production of news films. But all we have to do is to ascertain what are the legal rights of the plaintiffs. If those legal rights have been infringed, the plaintiffs are entitled to succeed without showing that they have suffered any damage, and although their success may embarrass the defendants in the conduct of their business.

As to what are their legal rights, I can feel no doubt whatsoever. The plaintiffs are the owners of the copyright in a march called "Colonel Bogey," and s. 1 of the Copyright Act says that that which is their copyright includes the sole right "to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered." I agree that "the work" there means the work or any substantial part of the work. I have equally no doubt that the defendants have infringed that copyright of the plaintiffs, because s. 2 says: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." In my opinion, the defendants have made a cinematograph film by which a substantial portion of the "Colonel Bogey" march can be reproduced. That the portion which they have taken is substantial cannot be denied. The part which has been taken consists of 28 bars, which bars contain what is the principal air of the "Colonel Bogey" march—the air which every one who heard the march played through would recognize as being the essential air of the "Colonel Bogey" march.

Then it is said by the defendants that they are protected by the first proviso to s. 2, sub-s. 1, of the Act, which enacts that amongst the acts which shall not constitute an infringement of copyright are: "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary." Mr. Macgillivray has asked us to hold that a cinematograph screen when displaying items of news is a newspaper within the meaning of that proviso. I see obvious difficulties in so holding. But let me assume it is a newspaper. Even then, what the defendants have done cannot be described as a fair dealing with any work for the purposes either of criticism, review, or newspaper summary. Test it in this way. The item of news with which we are dealing is the item of news that on a certain day the Prince of Wales reviewed the boys of the Naval School in question, and that they marched past him to the tune of "Colonel Bogey." Of course, any newspaper is entitled to say that, and that would be a summary of an item of news. The paper would also, of course, be entitled to publish a photograph of the boys marching past the Prince of Wales. But what they would not be entitled to do would be to say: "For the benefit of those who were not able to be present, we publish the principal 28 bars of the 'Colonel Bogey' march." That is just what the defendants have done. They have, for the benefit of those who were not present, photographed the boys marching past the Prince of Wales; and have also provided, for the people who would see that, a representation of the "Colonel Bogey" march.

In my opinion the plaintiffs are entitled to succeed in this action, and this appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Syrett & Sons.*

Solicitors for respondents: *Kerly, Sons & Karuth.*

W. I. C.

EVE J.

1934

April 24.

In re BROOKER.

PUBLIC TRUSTEE *v.* YOUNG.

[1934. B. No. 862.]

Law of Property—Partition—Proceeds of sale of land—" Absolutely vested in persons of full age in undivided shares "—Moieties vested in trustees upon different statutory trusts—Power to partition among legal personal representatives—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 3.

The power of partitioning land given to trustees for sale by s. 28, sub-s. 3, of the Law of Property Act, 1925, in cases where the proceeds of sale have " become absolutely vested in persons of full age in undivided shares," with the consent of the persons, if any, interested in possession of the net rents and profits of the land until sale, is exerciseable when the persons in whom the proceeds of sale are vested are trustees or personal representatives, and is not confined to the case where such persons are beneficially interested in the property.

In re Thomas, Thomas v. *Thompson* [1930] 1 Ch. 194 explained and distinguished.

Originating Summons.

By his will dated December 22, 1921, a testator, Thomas Elvy Brooker, gave to his wife, Jane Brooker (inter alia) all his rents, including the rents and property owned jointly with his brother Joseph, and directed that after their decease it should all be equally divided between his brothers and sisters therein mentioned, the shares of any that were deceased to be divided equally between their children. By a codicil dated January 18, 1923, the testator said that at his death he wished his brother Joseph to share equally with his brothers Ben and Will.

Thomas Elvy Brooker died on December 21, 1923, and letters of administration with the said will and codicil annexed were granted to his widow Jane Brooker on January 30, 1924.

At the date of his death the testator was entitled with his brother Joseph to a number of freehold properties, consisting of houses and lands in East Grinstead, as tenants in common in equal shares. Joseph Brooker, by his will made in 1929, appointed the defendants Charles Edward Simmons, Henry Joseph Brooker and Frederick Albert Brooker to be executors and trustees thereof, and devised all his real and personal estate to his trustees upon the usual trusts for sale subject to the proviso that the trustees were not to sell any part of the real estate devised to them until the death of the survivor of his six children. The net income of his estate was to be divided equally among his six children and the capital was ultimately to be distributed between the issue of his said children who should attain the age of 21 years or marry in equal shares per stirpes. The testator authorized his trustees to concur with the other persons entitled in making a partition of any property held in undivided shares.

Joseph Brooker died on March 11, 1929, and his will was duly proved on May 14, 1929.

In the above circumstances the said property became vested in the Public Trustee upon the statutory trusts on January 1, 1926, under Sch. I., Part 4, para. 1, sub-para. 4, of the Law of Property Act, 1925. (1) Jane Brooker died on January 27, 1933, leaving part of the estate of Thomas Elvy Brooker unadministered and on April 20, 1933, administration with the will and codicil annexed was granted of all his unadministered estate to the Public Trustee.

By an appointment dated March 1, 1934, and made between the Public Trustee of the first part, Joseph Brooker's trustees of the second part and the plaintiffs Harry Young and

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(1) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 28, sub-s. 3: "Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust) the trustees for sale may, with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale:

(*a*) partition the land remaining unsold or any part thereof; and

(*b*) provide (by way of mortgage or otherwise) for the payment of any equality money;

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale, or, where any part of the land becomes settled land, by a vesting deed, or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given."

Frederick Brooker of the third part, the plaintiffs were appointed to be trustees of the statutory trusts affecting the said property in the place of the Public Trustee.

The beneficiaries under Thomas Elvy Brooker's will and codicil desired the Public Trustee to sell the property of which his estate consisted and to distribute the proceeds. On the other hand Joseph Brooker's trustees and the beneficiaries under his will, owing to the desire expressed by their testator in his lifetime that his real estate should not be sold until the death of all his children, but that the property should be retained in specie for family and business reasons, part thereof being the headquarters of a company in which he was the principal shareholder, and several houses being occupied by his children, refused to agree to any sale.

In those circumstances it was arranged between the Public Trustee and Joseph Brooker's trustees that the property should be partitioned, and a scheme for its partition was prepared and agreed upon. The summons was taken out by the plaintiffs as statutory trustees asking whether upon the true construction of s. 28, sub-s. 3, of the Law of Property Act, 1925, and in the events which had happened the plaintiffs as trustees upon the statutory trusts of the land held in undivided shares had power under the sub-section with the consent of the defendants as legal personal representatives of the two estates respectively to partition the lands, and if they had no such power that they might be authorized by the Court under s. 57 of the Trustee Act, 1925, to partition the lands in accordance with the proposed scheme.

E. M. Winterbotham for the plaintiffs. Doubts have been felt whether there is power under s. 28, sub-s. 3, for trustees to partition land, so as to give executors of a deceased person any share in the property partitioned. The absence of any reference to legal personal representatives in s. 28 shows that "persons of full age" do not include executors or administrators, but only persons beneficially entitled. That is what the words naturally mean. *In re Thomas.* (1)

(1) [1930] 1 Ch. 194, 196.

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Hon. J. Trevor Roberts and *R. C. H. Horne* for the defendants. It is submitted that the partition proposed can be carried out under this section. In *In re Thomas* (1), the property was divided up and the shares settled by the testator's will. The learned judge there held that a tenant for life was not a person "absolutely entitled" to an undivided share, and that case is distinguishable from the present one. Trustees and personal representatives, as well as beneficiaries, come within the expression "persons of full age." If the words in the sub-section only referred to beneficial interests, the proviso which follows, directing conveyance by the trustees for sale to persons of full age "either absolutely or on trust for sale or . . . . by a vesting deed" would be altogether futile. And see s. 7, sub-s. 5, of the Settled Land Act, 1925. In *In re Gorringe & Braybon's Contract* (2), Bennett J. held on a vendor and purchaser summons, where the facts were very similar to those in the present case, that personal representatives and trustees came within the expression "persons of full age."

EVE J. The question raised in this summons is whether the words in s. 28, sub-s. 3, "vested in persons of full age in undivided shares" are to be read as including trustees and legal personal representatives or in some more restricted sense.

There is nothing in the section to limit the class to persons beneficially interested, and the terms of the proviso on which Mr. Roberts has relied support the wider interpretation which includes trustees and legal personal representatives. *In re Thomas* (1), a decision of Farwell J., was cited in support of the argument for the narrower interpretation, but all that the learned judge decided there was that the words do not extend to a case where the proceeds are only vested in life tenants.

The case of *In re Gorringe & Braybon's Contract* (2), wherein the vendor under a contract of August 12, 1932, applied by summons for, and obtained an order declaring that a partition

(1) [1930] 1 Ch. 194, 196.

(2) See post, p. 614.

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effected by a deed of November 21, 1927, was validly and effectively made under s. 28, sub-s. 3, of the Law of Property Act, 1925, and that a good title to the property had been shown, is more to the point. The purchaser had persisted in an objection that the deed was void and relied on the decision in *In re Thomas* (1) in support of his objection. At the date of the partition deed the proceeds of sale were vested, as to one moiety in the vendor beneficially, as to one-sixth in another beneficiary and as to the remaining two-sixths in trustees upon trust for two life tenants with remainder in each case to their children with divers remainders over in default of children. Bennett J. held that the case was not governed by the decision in *In re Thomas* (1), and made the declaration above indicated.

I agree with his judgment and declare that upon the true construction of s. 28, sub-s. 3, and in the events which have happened, the plaintiffs as trustees have power under the section with the consent of the defendants as the legal personal representatives of Thomas Elvy Brooker and Joseph Brooker respectively, to partition the lands described in the schedule to the summons. The costs of all parties to be taxed as between solicitor and client, with liberty to apply as to raising such costs.

Solicitors: *Waterhouse & Co., for Frederick Turner & Jones, East Grinstead.*

H. L. L.

NOTE.

Judge—Bennett J.

Feb. 9. 1933.

In re GORRINGE & BRAYBONS LIMITED'S CONTRACT.

[1932. G. 2809.]

At the date of the partition deed hereafter mentioned the legal estate in certain land at Kingston-by-Sea, in the county of Sussex, was vested in trustees upon the statutory trusts and the proceeds of sale to arise under the statutory trusts were vested as to one moiety in Lieutenant-General Sir George Frederick Gorringe beneficially, as to one-sixth part in William

(1) [1930] 1 Ch. 194.

Hugh Gorringe beneficially, as to another sixth part in Sir George Frederick Gorringe and William Hugh Gorringe upon certain trusts under which Mabel Elizabeth King was entitled to a life interest with remainder to her children with certain remainders over in default of children, and as to the remaining sixth part in the same persons upon similar trusts in favour of Dorothea Lewknor Gorringe and her children.

By a partition deed dated November 21, 1927, the statutory trustees partitioned the land subject to the statutory trusts among the persons entitled to it, and conveyed a certain part of it to Sir George Frederick Gorringe in fee simple in severalty.

By a contract dated August 12, 1932, made between Sir George Frederick Gorringe of the one part and Braybons Ld. of the other part, Sir George Frederick Gorringe agreed to sell to Braybons Ld. part of the land conveyed to him by the said partition deed.

An abstract was delivered to the purchasers and they delivered a requisition alleging that the partition deed was void in view of the decision of Farwell J. in the case of *In re Thomas*. (1) As the requisition was persisted in the vendor took out this summons claiming that a good title had been shown.

Gavin Simonds K.C. and *Raymond Jennings* for the vendor.

Swords K.C. and *Gravenor Hewins* for the purchaser.

BENNETT J. [after stating the facts set out above and reading s. 28, sub-s. 3, of the Law of Property Act, 1925:] Sir George Gorringe acquired the two-sixth shares of two of his brothers, so that on December 31, 1925, he was absolutely entitled to one moiety of the property, William Gorringe was absolutely entitled to one-sixth, and the two brothers as trustees were entitled to the remaining two-sixths. The question is whether they were " absolutely entitled " within the meaning of the sub-section, and whether the deed of partition is valid. There is no doubt that as regards one moiety Sir George was entitled to give the consent required by the sub-section, and William was entitled to do so as regards one-sixth. Were the two of them as trustees so entitled as regards the remaining two-sixths? If the property had been sold under the statutory trusts, these two persons would have been absolutely entitled to the net proceeds of sale in the same proportions, and it is contended that the two brothers as trustees are absolutely entitled to the two-sixths and able to give the necessary consent.

On the other hand it is contended that the two-sixths are not " absolutely " vested in the trustees, because they are trustees, and that the word " beneficially " must be read into the sub-section. This contention is to some extent based on the decision in *In re Thomas*. (1) But that case seems plainly distinguishable. There the trustees of the will in whom the property was vested, held it upon different trusts as regards different undivided shares, and the result of the Law of Property Act, 1925, was that the entirety of the land became vested in the trustees upon the statutory trusts. It was argued that the tenants for life were each absolutely entitled to one-fourth. Farwell J. in his judgment says (2): " They contend that the settled fourths are absolutely vested in the respective life tenants who are of full age. It is impossible however to accede to that contention, and therefore s. 28, sub-s. 3, does not apply." That is all that was decided

(1) [1930] 1 Ch. 194.

(2) Ibid. 197.

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in that case and it is distinguishable from the present case. In my judgment the two trustees here were entitled to the two-sixths of the net proceeds of sale absolutely, within the meaning of s. 28, sub-s. 3.

I therefore make a declaration that the partition was validly effected under s. 28, sub-s. 3, and that the vendor has shown a good title to the property.

Solicitors for the vendor: *Quicke & Card, for H. Montague Williams & Son, Brighton.*

Solicitors for the purchaser: *Thomas Eggar & Son, for J. K. Nye & Donne, Brighton.*

E. K. C.

LUXMOORE J.
1933
June 26;
July 31.

In re TOOTH.

THE TRUSTEE *v.* TOOTH.

[No. 191 of 1931.]

Bankruptcy—Bill of Sale—Transfer—Transferee taking possession of chattels comprised in Bill of Sale—Registration—Re-registration—Bankruptcy of grantor of Bill of Sale—Transferee's title to chattels—Claim by trustee in Bankruptcy—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 11—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

In December, 1926, T. executed a bill of sale to one H., which was registered and duly re-registered in May, 1926, five years later. In December, 1926, V. T., son of T., took a written transfer of the bill of sale and paid off the creditor. At the date of the transfer T. and his wife and V. T. and his wife were all living in the same house. Nothing was ever paid by T. to V. T., and in April, 1927, V. T. gave him notice of his intention to seize the property comprised in the bill of sale, and according to his own story took formal possession of the property comprised in it. In March, 1928, V. T. and his wife left the house he was living in with T. and went to another house near, leaving a few of the chattels covered by the bill of sale behind for the use of his mother, brother and sister, but taking away the rest. In May, 1931, T. was made a bankrupt.

On a claim by the trustee in bankruptcy against V. T. to the property comprised in the bill of sale and also to the proceeds of sale of certain furniture (which was also comprised therein) on the ground that the bill of sale had not been re-registered in May, 1931, as required by s. 11 of the Bills of Sale Act, 1878, and s. 8 of the Bills of Sale Act, 1882:—

Held, that the respondent V. T. took possession of the chattels in April, 1927, and that as regards those he did not remove when he left the house in March, 1928, he allowed his mother to retain them for her use and that of his brother and sister. He had therefore obtained the legal title to the chattels in April, 1927, and no re-registration of the bill of sale was necessary.

MOTION.

Motion of the trustee of a bankrupt's estate for a declaration that a certain bill of sale was void in respect of the personal chattels comprised therein, and that such chattels formed part of the bankrupt's estate. The facts are fully set out in the considered judgment of the learned judge.

O. Kean for the applicant.

W. N. Stable for the respondent. [He referred to *Johnson* v. *Diprose* (1); *Cookson* v. *Swire.* (2)]

O. Kean in reply. [He referred to *Ex parte Parsons, In re Townsend.* (3)]

Cur. adv. vult.

1933. July 31. LUXMOORE J. This is a motion by the trustee of Artemus Tooth, a bankrupt, for a declaration (1.) that a bill of sale dated May 10, 1921, made between the bankrupt of the one part and a firm of moneylenders trading as "Hollingsworth" of the other part, is void in respect of the personal chattels comprised therein, and (2.) that the personal chattels form part of the bankrupt's estate. The motion also asks for delivery up and other ancillary relief.

The bill of sale in question was given to secure 200*l*. and interest at 35 per cent., and it provided among other things that the chattels should be insured for 1500*l*. It was duly registered on May 12, 1921, and was re-registered on May 7, 1926. On December 28, 1926, the sum of 173*l*. was due to Hollingsworth on the security of the bill of sale. On that date the respondent, Vivian Artemus Tooth, a son of the bankrupt, paid the amount due to Hollingsworth and took a transfer of the bill of sale, the rate of interest on the money secured being reduced to 7 per cent. The transfer was effected

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(1) [1893] 1 Q. B. 512.

(2) (1884) 9 App. Cas. 653.

(3) (1886) 16 Q. B. D. 532.

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by a document dated December 28, 1928, expressed to be made between Hollingsworth of the first part, the bankrupt of the second part, and the respondent, Vivian Artemus Tooth, of the third part.

The transfer was made in these circumstances. In November, 1926, Hollingsworth were pressing the bankrupt for payment of the money owing to them and were threatening to seize and sell the property comprised in the bill of sale. The respondent, Vivian Artemus Tooth, was entitled to a reversionary interest under his grandfather's will ; he borrowed on the security of this interest sufficient money to enable him to pay off Hollingsworth. At the date of the transfer the bankrupt and his wife were living in Surbiton with the respondent and his wife. In April, 1927, the bankrupt had not repaid the respondent the money due under the bill of sale nor had he kept down the interest, although according to the respondent's story he continually asked him to do so. The respondent says that he gave the bankrupt notice of his intention to seize the property comprised in the bill of sale, and that he took formal possession of it. In March, 1928, the respondent and his wife left their house and went to reside at another address in Surbiton. When he left he took a considerable part of the chattels comprised in the bill of sale with him and those chattels are still in his possession, but he left the rest of the chattels at the old house. He says that he did so by arrangement with his mother, who was still living at the old house, and for her benefit and for that of his sister and brother, who were also living there. The mother died in November, 1929, and on her death the respondent, who was one of her executors, allowed his brother to retain the furniture until it was sold on April 19, 1932, by public auction, realizing 77*l.* 12*s.* 6*d.*

On May 14, 1931, a receiving order was made against the bankrupt and he was adjudicated bankrupt on May 18, 1931.

The trustee claimed the furniture held by the respondent and the proceeds of sale of the furniture sold by him on the ground that the bill of sale was not re-registered as required by the Bills of Sale Act (1878) Amendment Act, 1882, s. 8, and the Bills of Sale Act, 1878, s. 11. Sect. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, which replaced s. 8 of the Bills of Sale Act, 1878, provides that every bill of sale shall be void unless attested and registered as therein named; while s. 11 of the Act of 1878 provides that the registration of a bill of sale whether executed before or after the commencement of the Act must be renewed once at least every five years, and that if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or a further renewal, as the case may be, the registration shall become void.

It is common ground that the last re-registration took place on May 7, 1926, and that if reliance is to be placed on the bill of sale, it ought to have been re-registered on or before May 7, 1931.

The answer to the question whether re-registration was necessary or not depends in my judgment on what happened in April, 1927. Did the respondent in fact take possession of the goods under the bill of sale or not? If he did then his legal right to possession of the chattels was complete and was good against the world, although as between himself and his father, the relationship of mortgagor and mortgagee still subsisted. If the respondent obtained the legal title to possession such legal title as from the time when it was obtained no longer depended on the bill of sale and it became immaterial whether it was re-registered or not. If authority is wanted for these propositions I think it is to be found in the decision of the Court of Appeal in *Johnson* v. *Diprose* (1), and of the House of Lords in *Cookson* v. *Swire.* (2)

It is therefore necessary to determine what transpired in April, 1927. The respondent's evidence, as given by his affidavit filed in opposition to these proceedings and as explained in his cross-examination and re-examination, differs in certain respects from his evidence given on his private examination in the bankruptcy and it is supported by the affidavit of his brother, who was not cross-examined.

Notwithstanding the discrepancies I am satisfied that the

(1) [1893] 1 Q. B. 512.

(2) 9 App. Cas. 653.

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story told by the respondent in the proceedings before me is true and that he did in fact take possession of the chattels in April, 1927, and that with regard to such of them as he did not remove in March, 1928, he allowed his mother to retain them for her use and the use of his brother and sister.

This being so, I hold that the respondent obtained the legal title to the chattels in April, 1927, and no re-registration of the bill of sale was necessary. In the result the motion fails, and the trustee in bankruptcy must pay the respondent the costs of the motion.

Solicitors: *Woolfe & Woolfe; A. & G. Tooth.*

A. R. T.

BENNETT J.
1934
May 30.

In re GARLAND.

EVE *v.* GARLAND.

[1934. G. No. 347.]

Will—Bequest of " any house of which I may at the time of my death be the owner and occupier "—House bought for use as residence—No personal residence or use by testator—Words—" Occupier."

A testator bequeathed to his wife any house of which he might at the time of his death be the owner and occupier. At the date of his death his wife was in occupation of a house which he had bought and in which his furniture had been placed, but in which he had never resided, as, shortly after the purchase of the house, he became of unsound mind and was removed to a mental home:—

Held, that the testator was the occupier of the house at the time of his death and that his widow was entitled to the proceeds of sale of the house.

Observations of Lush J. in *R.* v. *St. Pancras Assessment Committee* (1877) 2 Q. B. D. 581 at p. 588 applied.

BY his will, dated August 6, 1930, Thomas Vesey Garland gave devised and bequeathed " any house of which I may at the time of my death be the owner and occupier to my wife absolutely free of duty."

The testator had on July 24, 1930, bought a freehold house known as " Meads," Wrestwood Road, Bexhill-on-Sea, Sussex, with the intention that it should be used as his residence.

On August 22, 1930, his furniture was placed in the house, and in September, 1930, he was removed to Bethlem Royal Hospital, Beckenham. On November 4, 1930, a receiver of his estate having been appointed under s. 116 of the Lunacy Act, by para. 7 of the order the receiver, who was the testator's widow, was allowed the use and occupation of the house rent free and the use of the patient's furniture and household effects therein, but she was directed out of her own moneys to pay the rates, taxes, and other outgoings in respect of the house and to keep the house and the furniture fully insured. She resided in the house from the month of September, 1930, until after the testator's death.

The executors of the will took out a summons for the determination of the question whether upon the true construction of the will the testator's widow was entitled to the proceeds of sale of the house (the executors having in 1934 sold the house) or whether the house formed part of the testator's residuary personal estate.

G. P. Slade for the plaintiffs.

G. A. Rink for the widow. The question of occupation is fully discussed in *Liverpool Corporation* v. *Chorley Union Assessment Committee*. (1) A man occupies a cow-house if he keeps it and puts cattle in it: see *R.* v. *Melladew*. (2) The fact of not being physically present does not prevent occupation.

[He also referred to *Drury* v. *Fitch*. (3)]

W. G. Hart for a beneficiary interested in a share of the income. The occupation in this case is that of the wife and not of the testator. A definition of "occupier" will be found in the judgment of Lush J. in *R.* v. *St. Pancras Assessment Committee*. (4) This testator never was able to become an occupier, because he became incapacitated. He never went into occupation within the meaning of the definition.

(1) [1913] A. C. 197, 210.
(2) [1907] 1 K. B. 192, 203.
(3) (1619) Hutton, 16.
(4) 2 Q. B. D. 581, 588.

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Hon. J. Trevor Roberts for another beneficiary referred to *In re B. A. S.* (1)

BENNETT J. [after stating the facts and the nature of the question raised by the summons, continued :] There is no question but that the testator was the owner of the house at the time of his death. The question is whether he was also the occupier. In order that the widow might take the house under the terms of the devise two conditions had to be fulfilled. The testator had to be the owner and also the occupier.

Now it seems to me fairly plain on the rating cases cited to me that residence and occupation are not the same thing. A person can be the occupier, although he does not reside in the house, and I think that the passage in the judgment of Lush J. in *R.* v. *St. Pancras Assessment Committee* (2) enables me to decide the point in question in favour of the testator's widow. Lush J. says : " It is not easy to give an accurate and exhaustive definition of the word ' occupier.' Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year."

The house was furnished in August, 1930, and thereafter until the time when the testator died it was ready for the testator to go into whenever he recovered. I think that, on these facts, having regard to the opinion given by Lush J., I am able to come to the conclusion that the testator was not only the owner of the house in question but also the occupier. The answer to the question is that the testator's widow is entitled to the proceeds of sale of the freehold house.

Solicitors : *Howse & Eve ; W. J. Watts Miller.*

(1) [1898] 2 Ch. 392.

(2) 2 Q. B. D. 581, 588.

J. L. D.

C. A.
1934
June 15.

In re HILL.

CLAREMONT *v.* HILL.

[1933. H. 618.]

Solicitor—Taxation—Profit Costs — Solicitor-trustee — Originating Summons taken out by solicitor-trustee—Employment by solicitor-trustee of his own firm.

A solicitor, who was a trustee under an instrument which gave no power to a solicitor-trustee to charge profit costs for work done in connection with the trust, took out an originating summons for the determination of certain questions in connection with the trust. The solicitor-trustee was a partner in a firm of solicitors, and had before this transaction arranged with his partners that he should do only a limited amount of work in connection with the partnership and should receive a salary of 600*l.* a year out of the profits of the firm, that amount being only a small portion of their profits. The solicitor-trustee employed his firm to do the legal work in connection with the trust, the work being done by a partner who was not a trustee. In taxing the solicitor-trustee's bill of costs the Taxing Master disallowed all his profit costs and allowed only out of pocket disbursements, on the ground that he had employed his firm to do the work. That decision was upheld by Eve J. On appeal:—

Held, affirming the decision of Eve J., that inasmuch as the solicitor-trustee derived some benefit from the profits of the partnership, although limited in amount, he was not entitled to employ the firm in which he was a partner to do work in connection with the trust for which profit costs could be charged.

Christophers v. *White* (1847) 10 Beav. 523 applied.

Semble, that the decision of Clauson J. in *In re Gates ; Arnold* v. *Gates* [1933] Ch. 913 was correct.

Appeal from a decision of Eve J. on a summons to vary a Taxing Master's certificate.

Under the trusts of an Indenture dated January 5, 1920, of which Caroline Hill, Albert William Claremont and Thomas Swan were the present trustees, Caroline Hill was entitled to an annuity of 66*l.* 13*s.* 4*d.*, and subject thereto the Atlas Assets Company, Ld., were entitled to the investments and property subject to the trusts.

The Indenture contained no provision entitling a trustee who might be a solicitor to charge profit costs for work done in connection with the trust.

Claremont on February 16, 1933, took out an originating summons, to which Caroline Hill, the Atlas Assets Company and Thomas Swan were defendants, to determine whether the annuity was payable only out of the income, or if necessary out of the corpus of the money or investments for the time being representing the War Stocks formerly subject to the trusts of the Indenture.

Bennett J. on May 15, 1933, made an order that the annuity of 66*l.* 13*s.* 4*d.* was a continuing charge on the income of the fund, and that if necessary the trustees ought to raise out of capital such a sum each quarter as when added to the quarter's income would make up 16*l.* 13*s.* 4*d.* He also ordered the Taxing Master to tax as between solicitor and client the costs of the plaintiff and of the defendants of and incidental to and consequent upon the application, and directed that such costs when taxed should be paid out of the capital of the fund.

The plaintiff, Claremont, was a solicitor, a member of the firm of Claremont, Haynes & Co., which firm consisted of three members, the plaintiff, Mr. Stuart and Mr. Tildesley. In August, 1929, the plaintiff came to an agreement with his partners that owing to his advancing years and indifferent health he should cease to be an ordinary working partner and should only attend at the office at such times as he might find convenient to himself, and that for consultative purposes, and that he should receive a fixed sum of 600*l.* per annum payable out of the profits of the firm. There was a supplemental agreement in writing dated February 23, 1932, carrying out the arrangement that had already been come to. The plaintiff employed his firm throughout in connection with the affairs of the trust, which had for a long time been attended to by Mr. Tildesley, who was not a trustee, and with the exception of two or three letters which the plaintiff himself wrote, the whole of the business preliminary to and of the proceedings connected with the originating summons had been attended to by Mr. Tildesley.

The plaintiff in his affidavit said that the sum of 600*l.* per annum which he received was a small fraction of the profits of the firm, and that apart from that sum he had no interest in the profits of the firm. In respect of the financial year of the firm in which the said proceedings had taken place, the profits of the firm earned before the commencement of the proceedings exceeded very considerably the sum of 600*l.*, and accordingly the plaintiff alleged that he was not entitled to any share of the fees due to the firm in respect of such proceedings.

The plaintiff's bill of costs was duly carried in for taxation, and the Taxing Master gave direction that the solicitors for the second and third defendants (the Atlas Assets Company, Ld., and Thomas Swan) should tax all the costs of the action, the solicitors for Caroline Hill not being concerned in the result thereof. The Taxing Master on the taxation disallowed all the plaintiff's profit costs on the ground that the plaintiff, a trustee without power to charge profit costs, employed his firm to do the work. He considered the case concluded by the decision of Clauson J. in *In re Gates ; Arnold* v. *Gates* (1), and he allowed the plaintiff only out of pocket disbursements.

The plaintiff appealed to Eve J. by summons to vary the Taxing Master's certificate.

EVE J. [after stating the facts, continued :] On these facts and the contention on the part of the plaintiff that he had no interest in these profit costs, it has been contended that the decision in *In re Gates* (1) does not apply to this case. To determine whether this be so or not it is necessary to appreciate the grounds upon which the judgment of Clauson J. is based. I think they are accurately summed up in the head-note, and they come to this : first, that a solicitor-trustee who employs the firm of which he is himself a partner to act for him thereby abandons his right to profit costs, and secondly that an agreement under which he has no share in the profit costs is of no avail. In this case the plaintiff employed the firm in which he was and is a partner to act for him, and it is necessary to consider whether the agreement under which he is entitled to a fixed annuity in lieu of a share in the partnership profits operates to exclude him from participation in the profits of the business. As at present advised, I think the annuity ought to be regarded as spread over all the profits of each year and to include a percentage of the profit derived from each transaction from which a profit results. But, as I have indicated, this consideration is unnecessary when it is once admitted that the firm was employed. I must dismiss the summons.

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(1) [1933] Ch. 913.

The plaintiff appealed.

J. F. Bowyer for the appellant, A. W. Claremont. Both the Taxing Master and Eve J. were wrong in disallowing the profit costs of the plaintiff. They both considered that they were bound by the decision of Clauson J. in *In re Gates* (1), where he held that in the absence of an express power in the instrument creating the trust for a solicitor-trustee to charge, a solicitor-trustee who employs the firm of solicitors of which he is himself a partner to act for him in the conduct of an action to administer the trust estate is in no better position than a solicitor-trustee who acts as his own solicitor, and, on taxation of his costs, will not be allowed profit costs, even though there be an agreement that the solicitor-trustee shall have no share in profit costs. That decision is wrong, and is in conflict with the earlier authorities. The true principle is that a solicitor-trustee must not put himself into such a position as that his duty and his interest conflict. If he has put himself into such a position he is not to be entitled to receive profit costs, but if he has not put himself into a position in which his duty and interest conflict the fact that the firm in which he was a partner has been employed to act as solicitors will not prevent them from charging profit costs. In the present case Claremont was not interested in the profit costs, because he only received 600*l.* a year out of the profits of the firm, and that sum was well assured to him. In *Christophers* v. *White* (2) the professional work in connection with a trust was transacted by a firm of solicitors one of whom was a trustee, and it was held that though the business was done by one of the partners who was not a trustee, only out of pocket costs could be allowed. But in that case the partner who was a trustee was going to share in the profit costs; there was no agreement as to non-sharing of profit costs. In *Broughton* v. *Broughton* (1) an executrix and trustee under a will employed her co-trustee, who was a solicitor, to transact the necessary legal business of the trust, and it was held that the solicitor was only entitled to costs out of pocket. Lord Cranworth L.C. there said (2): "The rule applicable to the subject has been treated at the Bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty." In *Clack* v. *Carlon* (3) a trustee who was a solicitor employed his partner professionally in the matter of the trust upon the terms that such partner should alone be entitled to the profits, and it was held that the rule that a trustee shall make no profit of his trust did not extend to his partner, and his professional charges were accordingly allowed. Stirling J. in *In re Doody* (4) said that "as a general rule, neither a solicitor trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust." He then proceeded to say that to this general rule there are some exceptions, and he then cited *Clack* v. *Carlon* (3), in which Lord Hatherley, when Vice-Chancellor, had decided "that a solicitor-trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges." In *In re Gates* (5) the work was actually done by

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(1) [1933] Ch. 913.

(2) 10 Beav. 523.

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(1) (1855) 5 De G. M. & G. 160.
(2) Ibid. 164.
(3) (1861) 30 L. J. (Ch.) 639.
(4) [1893] 1 Ch. 129, 134.
(5) [1933] Ch. 913.

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the trustee-partner working in the firm's name—as appears from the Taxing Master's answers to the plaintiff's objections —whereas in the present case the work was in fact done by a partner who was not a trustee. After the supplemental agreement of February 23, 1932, was entered into it was no longer practicable for any client of the firm to secure the services of Claremont as a solicitor, and he ceased to receive any share of the profits of the firm other than a fixed annual salary. There was therefore no conflict between his interest and his duty with regard to this matter.

J. G. Strangman for the respondents, the Atlas Assets Company, Ld., and Thomas Swan. The decision of Eve J. is right. In the first place the case is covered by the decision of Clauson J. in *In re Gates* (1), and that decision is good in law. That case decided that if a trustee-solicitor, who is a partner in a firm of solicitors, employs that firm to do work in connection with the trust, he cannot charge profit costs for the work so done.

[GREER L.J. The present case is different from *In re Gates* (1) in that the plaintiff is entitled to a salary of 600*l.* a year out of the profits of the firm, and not to a share of the profits.]

In order to ascertain what are the profits of the firm these profit costs would have to be taken into account. It has been well settled since the decision in *Cradock* v. *Piper* (2) that Taxing Masters are entitled, under an order to tax costs generally or to tax costs as between solicitor and client, to take notice of the fact that the solicitor is also a trustee and to apply the rule that a trustee who is also a solicitor is not entitled to charge costs except costs out of pocket. A trustee-solicitor who employs his own firm to do work in connection with the trust thereby puts himself into a position in which his interests may conflict with his duty as a trustee. It was laid down in *Christophers* v. *White* (3) that it does not make any difference that the solicitor-trustee does not do any of the work himself. Nothing was said in *In re Gates* (1) about the solicitor-trustee doing the work himself, and the judge did not rely upon that fact. In *Clack* v. *Carlon* (1) the partner was employed to do the work as an individual solicitor, and he took all the profit costs. In *In re Harman & Son* (2) the trustee was only a salaried partner in the firm of solicitors which did the work, and drew a fixed salary whether the practice was carried on at a profit or at a loss, and was not entitled to share in the profits of the firm. In the present case if the firm received profit costs in respect of this work the plaintiff Claremont would take some part of those costs, as his salary must be deemed, as Eve J. held, to include a percentage from each transaction of the firm within the year from which a profit resulted. In fact the plaintiff Claremont did some important work in connection with the matter.

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(1) [1933] Ch. 913.
(2) (1850) 1 Mac. & G. 664.
(3) 10 Beav. 523.

J. F. Bowyer replied.

GREER L.J. In this appeal it is contended that the judgment of the learned judge below was wrong, because he misconstrued the effect of the previous decisions of the Courts, including the decision of Clauson J. in *In re Gates.* (3) I have come to the conclusion that the learned judge took the right view in *In re Gates.* (3)

In this case a member of a firm of solicitors, Mr. Albert William Claremont, was a trustee under a deed dated January 5, 1920, and the property of which he was trustee became the subject-matter of an originating summons for the administration of the trusts. In the course of the inquiry made necessary by the originating summons, the firm, of which he was a partner, acted as solicitors for the trustees. It has been established now for many years that a solicitor-trustee, unless the deed which appoints him to be such a trustee contains a clause entitling him to charge for his services, must perform his duties as a trustee without making any charge therefor. He cannot as a solicitor charge any profit costs; he is only entitled to charge the sums which he has to pay out of his pocket. That rule has been extended to the case of a trustee who is a member of a firm when the firm acts as solicitors in the matters relating to the trust, and the firm claims to be entitled to charge profit costs. Costs of that kind have been disallowed in a number of cases. I need not refer to any of them beyond *Christophers* v. *White* (1) and the decision of Clauson J. in *In re Gates*. (2) In *Christophers* v. *White* (1) it was decided that a trustee could only be allowed costs out of pocket for professional services transacted by a firm in which he was a partner, although the business was done by one of the partners who was not a trustee. That was a case in which there was no limitation, such as there is in this case, with regard to the share of the profits of the firm's business which the trustee was to receive. In my judgment that makes no difference. The situation at the time these costs were incurred was, that under an arrangement entered into between Mr. Claremont and the other members of the firm on August 31, 1929, which was confirmed by an agreement in writing dated February 23, 1932, which document has been produced to us and was before the learned judge in the Court below, Mr. Claremont continued to be a partner in the firm, but a limitation was placed upon the demands that his co-partners could make on him with regard to the work that he had to do for the partnership, and there was also a limitation as to the amount he would receive out of the profits of the partnership, the share of the profits which he would receive being limited to 600*l.* per annum. The effect of the agreement was that he was still receiving a share of the profit costs limited to 600*l.* per annum. It is conceivable that the business might not be so profitable as to make his share of the profits a sum of 600*l.*, but in fact at the time that these costs were incurred the profits had up to that time been such as would, if the accounts were taken at that time, give him 600*l.* I think, however, that makes no difference. He was still interested in the profits made by the firm, and his position was such, not that he would in fact be influenced by the desire that his firm, of which he was a partner, should be entitled to a share of the profits, but that that fact might influence his judgment in what he did. It is sufficient if he was in a position in which his judgment and his conduct of the litigation might be influenced. Of course a trustee who is a solicitor is not prevented from doing what any other trustee can do —namely, employ an independent solicitor to act for him. The independent solicitor who acted for him would be entitled to his profit costs and the trustee would be entitled to his proper disbursements, including the amount he paid to an independent solicitor. There have been cases in which it has been held that he may make one of his partners an independent solicitor. It must, however, be clear in such a case that the partner who is a trustee is, as was said in *Clack* v. *Carlon* (1), quoad the business in question not in partnership with the partner who is employed to do the work and who makes a charge therefor. In those circumstances the trustee could treat the payments he had to make to his partner, who was for this purpose regarded as not being his partner, as a part of his out of pocket expenses which he, the trustee, had incurred by reason of the bill presented to him by the partner in a matter with regard to which the partner has been treated as being an independent solicitor and as being entitled to charge for his own benefit.

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(1) 30 L. J. (Ch.) 639.
(2) [1912] W. N. 111.
(3) [1933] Ch. 913.

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(1) 10 Beav. 523.

(2) [1933] Ch. 913.

It does not seem to me in this case necessary to determine whether the decision of Clauson J. in *In re Gates* (2) was or was not correctly decided. My impression is that if the firm in which the solicitor-trustee is a partner is employed in connection with the trust it is unnecessary to inquire into the question whether any profits made by the firm are going into the pocket of the trustee. I gather that that was the view taken by the learned judge in *In re Gates* (2), that in fact the firm, which was acting on behalf of the solicitor-trustee, cannot be allowed their profit costs; but whether that is right or wrong I do not think that arises in the present case, although I am inclined to think, if it were necessary to decide the point, that I should come to the conclusion that the decision of Clauson J. was right.

(1) 30 L. J. (Ch.) 639.

(2) [1933] Ch. 913.

For these reasons I think the appeal must be dismissed.

MAUGHAM L.J. In this appeal from Eve J. the material facts to bear in mind are the following: The plaintiff is a solicitor, his firm consisting of himself and two other members, one of them a Mr. Tildesley. The plaintiff happens to be a trustee of an Indenture dated January 5, 1920. As plaintiff he took out an originating summons entitled, In the matter of the trusts of that Indenture, for a certain declaration as to construction. The declaration was subsequently made, and it was ordered that the costs of all parties as between solicitor and client should be taxed and paid out of the fund subject to the trusts of the Indenture. When the plaintiff's bill came to be taxed the Taxing Master disallowed all the plaintiff's profit costs on the ground that the plaintiff was a trustee without power to charge under the Indenture, who had employed his firm to do the necessary work. In fact the plaintiff, although a member of the firm, has of late preferred to do a very small amount of work in consideration of a salary of 600*l.* a year. He, however, remains a partner. The firm was employed by the plaintiff to do the work, and Mr. Tildesley, one of the members of the firm, did practically the whole of the business which was involved. The Taxing Master having disallowed all the profit costs of the plaintiff, the matter came before Eve J., who, following a recent decision of Clauson J. in *In re Gates* (1), dismissed the summons to review the taxation with costs. I think this Court is not concerned at all with the question whether the case is a hard one or not, because these cases depend upon rules to which it is necessary to adhere.

The general rule no doubt is this, that neither a solicitor who is a trustee, nor a firm of solicitors of which the trustee is a member, can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust. There are, however, some exceptions to this general rule. In particular there is an exception which was the result of a decision by Lord Hatherley, when

(1) [1933] Ch. 913.

he was Vice-Chancellor, in *Clack* v. *Carlon.* (1) In that case the defendant Carlon was the trustee under a deed which the suit was instituted to carry into effect. He was a solicitor, and he was astute enough to employ his partner, Mr. Haynes, in the trust matter under an arrangement which was satisfactorily proved, by which it was agreed that Haynes should in all the matters connected with the trust act as solicitor for Carlon, and should alone be entitled to receive for his own benefit any costs and charges which might be incurred in carrying on the trust. Be it observed that there are two material facts there, one that Haynes was to act as solicitor in doing this work, and secondly that he alone could receive the whole of the costs and charges which might be incurred in so doing. The result was that Carlon was wholly disinterested in the solicitor's work done by Haynes. Wood V.-C., after referring to the rule on which the denial of costs to a solicitor-trustee is founded as one resting mainly, though not entirely, on the ground that a trustee shall not make a profit out of his trust, and after referring to the fact that this extends to the case of a partner, proceeds to deal with the case before him, in which it was proved that no profit was either received or receivable by Mr. Carlon in any way in connection with the business. Then he deals with an argument which had been put forward on behalf of those who objected to the solicitor, Mr. Haynes, receiving any profit costs in this way (2): "It was said that partners might make an arrangement that each should take the other's trustee business, and thus a door for fraud be opened. I confess I see no reason why such an arrangement should not be made, or why a trustee should not be able to say to his partner: 'Quoad this transaction we are not in partnership.' He may then employ his partner in the same way as he might employ his town agent, and the partner will stand in the same position as anybody else." That common-sense decision, if I may venture so to describe it, has been followed ever since. It has not been doubted, but so far as I know it has never been extended. In the case

(1) 30 L. J. (Ch.) 639.

(2) Ibid. 640.

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of *In re Doody* (1), a decision of Stirling J. which afterwards went to the Court of Appeal, Stirling J. states the general result of the decision of Lord Hatherley when Vice-Chancellor in *Clack* v. *Carlon.* (2) He says (3): "A solicitor trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient." The question is whether the last sentence is wrong, and whether a solicitor-trustee who employs the firm in which he is himself a partner to act in trust affairs, an employment which necessarily places some obligation on himself as a member of the firm, and who derives some benefit from the employment and from the charges earned by his firm, inasmuch as the fund from which his salary of 600*l.* a year may be paid is thereby increased, is within the doctrine as laid down in *Clack* v. *Carlon.* (2) It is contended that the exception to the general rule may be extended to the present case, because it is established on the facts that the profits of the firm were such that the 600*l.* a year could easily have been paid without any reference to these profits at all. I am of opinion, like my brother Greer, that it is impossible to extend the rule to the circumstances of this case. The contention seems to me to omit to realize what Wood V.-C. declared should be done—namely, to take the step of ceasing to be quoad the transaction in question in partnership with the person who does the work. Moreover, I think the suggested extension of the rule as laid down by Lord Hatherley might lead to very great difficulty in a case where the profits of the firm were such that the salary might be in danger of not being paid unless the profit costs of the transaction were available for the purpose. In a word I agree with what Stirling J. said in *In re Doody* (3), that nothing short of the provisions mentioned by Lord Hatherley when Vice-Chancellor in *Clack* v. *Carlon* (2) will be sufficient to entitle the solicitor-trustee to charge his profit costs.

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(1) [1893] 1 Ch. 129.

(2) 30 L. J. (Ch.) 639.

(3) [1893] 1 Ch. 129, 134.

It will be observed that in coming to that conclusion I have not thought it necessary to rely on the decision of Clauson J. in *In re Gates* (1), which has been referred to. Whilst I do not think that *In re Gates* (1) is precisely in point, I do not wish to suggest in any way that the decision is wrong, because in my opinion it is correct.

In those circumstances the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Claremont, Haynes & Co.*

Solicitors for respondents: *Warren, Murton, Foster & Swan.*

R. F. S.

In re DORMAN, LONG AND COMPANY, LIMITED.

[00400 of 1933.]

In re SOUTH DURHAM STEEL AND IRON COMPANY, LIMITED.

[00438 of 1933.]

MAUGHAM J.
1933
Nov. 22, 23, 24, 28, 29, 30.

Company—Reduction of capital—Amalgamation—Schemes of Arrangement—Circulars—Proxies in form settled in Chambers—Meetings—Resolutions approving schemes—Dissentient debenture stockholders and shareholders—Rejection of proxies against resolutions not in form settled in Chambers—Right to vote by general form of proxy—Fresh meetings—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 91—*Joint Stock Companies Arrangement Act,* 1870 (33 *&* 34 *Vict. c.* 104), *s.* 2—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 120—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 153, 154, 288.

In 1933, Dorman, Long & Co., Ld., and South Durham Steel and Iron Company, Ld. (hereinafter respectively called "Dormans" and "South Durham"), provisionally agreed that Dormans should acquire South Durham's undertaking and assets. Two schemes of arrangement were prepared, one between Dormans, its 5½ per cent. debenture stockholders and its shareholders, and the other between South

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(1) [1933] Ch. 913.

MAUGHAM J.

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DORMAN, LONG & CO., *In re.*

SOUTH DURHAM STEEL AND IRON CO., *In re.*

Durham and its debenture stockholders and shareholders, each scheme being conditional on the Court's sanctioning the other before the end of 1933.

On June 19, the Court ordered that Dormans and South Durham should convene separate meetings of their interested debenture stockholders and of their classes of shareholders, to consider and if thought fit approve the respective schemes, by letter enclosing a print of the scheme and a proxy in the form settled in Chambers. On June 30, a circular signed by South Durham's secretary, a notice of the meetings, and forms of proxy settled in Chambers, were sent to South Durham's debenture stockholders and shareholders. The circular stated (inter alia) that a revaluation of South Durham's assets had been made by its auditors and confirmed by two named gentlemen. The forms of proxy purported to appoint a certain person as proxy, leaving the donor of the proxy to write "for" or "against" before the words "the scheme." The meetings were to be held on July 19, and a note at the foot of the proxy stated that the proxy must be lodged not later than noon on July 15. On July 3, a circular signed by Dormans' secretary, notices of the meetings ordered by the Court of its debenture stockholders and shareholders, proxies in the form settled in Chambers, and voting cards, were sent to Dormans' debenture stockholders and shareholders. The circular stated (inter alia) that the whole of Dormans' assets had been revalued upon the basis of their earning power and that the revaluation had been confirmed by two named gentlemen. These were the gentlemen who had confirmed the revaluation of South Durham's assets. The circular stated also that the trustees for the stockholders, after careful investigation, recommended the scheme for the stockholders' approval. It did not state the figures arrived at in the revaluation, nor did it state that, as was the fact, the trustees for the stockholders, who were a bank which had financed Dormans, stood to benefit by the scheme. The forms of proxy were substantially the same as those sent out with South Durham's circular, the date of the meetings being July 27, and the proxies being required to be lodged not later than 6 P.M. on July 25. Along the side of each voting card was written in red ink "If you are voting as proxy for other holder(s), please write the name of holder(s) on the back of this card." On July 3 and July 10, H., a shareholder in South Durham, wrote to its shareholders criticizing the scheme and asking them not to sign proxies in favour of it but to sign proxies against it which he enclosed with his second letter.

At South Durham's meetings H.'s proxies were rejected as being in a form different from that settled in Chambers, and certain proxies also were rejected as having been lodged after the time fixed for lodging proxies. The chairman reported that, if H.'s proxies were excluded, the scheme would be carried by the requisite statutory majority, and that if they were admitted there would be a majority in number, but not the three-fourths' majority in value, in favour of the scheme.

On July 19, a committee of debenture stockholders in Dormans who opposed the scheme, among whom was L., sent a circular to about half the total number of holders of 200*l.* or more 5½ per cent. debenture stock, asking them to vote against it. Many replied that they wished to

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revoke the proxies they had lodged and vote against the scheme, but feared that it would be too late. At the meeting of Dormans' debenture stockholders, voting cards with the red ink side-note on them were handed to those attending, and the chairman asked that they would record their votes on them. At the meeting certain proxies were rejected on the ground that they had been lodged after the time fixed for lodging proxies. The chairman reported that at all of Dormans' meetings resolutions approving the scheme without modification were passed.

Petitions asking for the Court's sanction to the respective schemes came on for hearing on November 22, Dormans' petition being opposed by the debenture stockholders, of whose committee L. was a member, and South Durham's by H. On the hearing of Dormans' petition L. stated in an affidavit that he had no instructions with his voting card, that by request he (L.) took a vote by show of hands on the chairman's refusing to do so and declared the resolution approving the scheme lost, and that the chairman left the room. The chairman gave evidence denying that he left the meeting before the vote was taken and another witness denied that the statements in L.'s affidavit about the meeting were accurate.

The confirmation of the schemes by the Court was sought under ss. 153 and 154 of the Companies Act, 1929, sections giving power to compromise with creditors and members and providing for facilitating reconstruction and amalgamation of companies:—

Held, (1.) that, in determining whether a compromise or arrangement should be sanctioned, the Court must be satisfied that the resolutions in favour of it are passed by the statutory majority in value and number, in accordance with s. 153, sub-s. 2, of the Companies Act, 1929, and that the proposal is such as intelligent and honest members of the classes concerned, acting in respect of their own interests, would approve.

In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co. [1891] 1 Ch. 213, and *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch. 385, considered.

(2.) that s. 153 of the Companies Act, 1929, gives a general right to vote by proxy, using any proper form of proxy, and the proxies need not be sent to the company's offices before the meeting.

Practice Directions [1896] W. N. 56 and [1910] W. N. 154, considered: *In re Magadi Soda Co.* [1925] W. N. 50, considered and distinguished.

(3.) that directors who, pursuant to the Court's order, receive proxies for or against a scheme, must use them.

(4.) that it is the Court's duty carefully to scrutinize complicated schemes and that, in the circumstances, Dormans' circular was insufficient, and misleading in its reference to the approval of the scheme by the trustees for the stockholders, and should have stated the amount of the revaluation.

(5.) that the description in South Durham's circular of the auditors' report as if it were a valuation of South Durham's assets was justified only if the report was prepared solely in order to ascertain the relative values of the assets of Dormans and South Durham, that the opinions of South Durham's board were justified on an optimistic view, and that the board had acted reasonably and in the best interests of those concerned.

PETITIONS.

The first of these petitions was presented by Dorman, Long & Co., Ld. (hereinafter called "Dormans"), for the Court's confirmation of a reduction of Dormans' capital forming part of a scheme of arrangement under ss. 153 and 154 of the Companies Act, 1929 (giving power to compromise with creditors and members and providing for facilitating reconstruction and amalgamation), between Dormans and the holders of its 5½ per cent. first mortgage redeemable debenture stock, its preference shares, preferred ordinary shares and ordinary shares, and for the Court's sanction to the scheme, under s. 153, with appropriate consequential relief under s. 154, for carrying out the amalgamation of Dormans' undertaking with that of South Durham Steel and Iron Company, Ld. (hereinafter called "South Durham"), intended to be effected under the scheme.

The second petition was presented by South Durham for the Court's order or orders sanctioning an arrangement, involving the proposed amalgamation, between South Durham, its debenture stockholders, preference shareholders, ordinary shareholders and "B" ordinary shareholders and making provisions for all matters necessary for a full and effective carrying out of the amalgamation.

Dormans was incorporated on November 2, 1889, under the Companies Acts, 1882 to 1886. At the date of its petition its capital was 11,248,146*l.*, divided into 883,918 6 per cent. cumulative preference shares of 1*l.* each, 2,052,746 8 per cent. preferred ordinary shares of 1*l.* each, and 8,311,482 ordinary shares of 1*l.* each, all issued and fully paid up. There were also then outstanding 400,000*l.* 4 per cent. first mortgage perpetual debenture stock, not affected by the proposed scheme of arrangement, secured by a trust deed dated May 28, 1900, being a first specific charge on the freehold premises mentioned in the deed and a floating charge on all Dormans' other property and undertaking save as therein mentioned, and 5,135,944*l.* 5½ per cent. first mortgage redeemable debenture stock. This stock was repayable at par on May 1, 1963, or earlier by operation of a sinking fund calculated to redeem the whole of it at par on that date and was redeemable (in whole but not in part) at 102 per cent. on or at any time after May 1, 1943, on not less than three calendar months' notice. It was secured by a trust deed dated July 26, 1923, and made between Dormans and Barclays Bank, Ld., and constituted a specific charge on all Dormans' freehold and leasehold properties (with certain exceptions) subject, as regarded part of those properties, to the specific charge securing the 4 per cent. first mortgage perpetual debenture stock, and a floating charge upon the undertaking and all Dormans' other property with certain exceptions and subject, as to part thereof, to the floating charge securing the 4 per cent. stock.

South Durham was incorporated on December 29, 1898. At the date of its petition its capital was 1,250,000*l.*, divided into 300,000 preference shares of 1*l.* each, 350,000 ordinary shares of 1*l.* each, all issued and fully paid up, and 600,000 "B" ordinary shares of 1*l.* each, 587,820 of which were issued and fully paid up. There was also then outstanding 300,000*l.* 4½ per cent. perpetual debenture stock which South Durham had issued and which was secured by a trust deed dated May 1, 1900. The deed constituted the stock a specific charge on the hereditaments and premises therein mentioned, and a floating charge on South Durham's undertaking and all its other assets except its uncalled capital.

In and after 1928 South Durham acquired, and at the date of its petition owned, 980,516 shares in the capital of Cargo Fleet Iron Company, Ld. (hereinafter called "Cargo Fleet"). Cargo Fleet's capital was 1,000,000*l.*, divided into 1,000,000 shares of 1*l.* each, and at the date of South Durham's petition it had outstanding 130,100*l.* 4½ per cent. first mortgage debentures repayable at par on January 1, 1946, but redeemable earlier at Cargo Fleet's option at 5 per cent. premium on six months' notice, and constituting a first charge on Cargo Fleet's undertaking, and 496,500*l.* 6 per cent. "A" mortgage debentures redeemable at any time at Cargo Fleet's option at 5 per cent. premium on three months' notice, and constituting a second charge on the undertaking.

On June 15, 1933, a provisional agreement was entered into between Dormans and South Durham for the acquisition by Dormans of the whole of South Durham's undertaking and assets. A scheme of arrangement was prepared between Dormans and the holders of its 5½ per cent. first mortgage redeemable debenture stock, and its preference, preferred ordinary, and ordinary shares. The scheme was conditional upon its acceptance by the debenture stockholders and the shareholders, and upon the acceptance by the debenture stockholders and shareholders of South Durham, and the sanction by the Court before December 31, 1933, of a scheme of arrangement between South Durham and its debenture stockholders and shareholders.

Under Dormans' scheme, Dormans' capital was to be reduced from 11,248,146*l.* to 1,750,678*l.* in 919,530 preferred ordinary shares of 1*l.* each and 831,148 deferred ordinary shares of 1*l.* each, to be kept by the then shareholders, and to be reincreased to 11,248,146*l.* by the creation of 1,985,784 6 per cent. non-cumulative preference shares ranking as to dividend and capital in priority to the preferred ordinary shares, 2,323,284 additional preferred ordinary shares of 1*l.* each (to be issued, under South Durham's scheme, to the shareholders of South Durham, the 5½ per cent. redeemable debenture stockholders of Dormans, and Dormans' bankers), one management share, and 5,188,399 shares not then to be issued. Of the 5,135,944*l.* 5½ per cent. first mortgage redeemable debenture stock 2,567,972*l.* was to be surrendered, the holders receiving in exchange, for each 100*l.* of stock held before surrender, 30 6 per cent. preference shares and 30 preferred ordinary shares of 1*l.* each, credited as fully paid up, in Dormans' reorganized capital. The surrendered stock was to be cancelled, save for 650,000*l.* to be available for reissue as " A " 5½ per cent. redeemable debenture stock, of which 643,910*l.* was to be issued in part payment for South Durham's undertaking. The remaining 2,567,972*l.* of the 5½ per cent. redeemable debenture stock, still to be held by the then debenture stockholders, was to be converted into " B " stock with interest contingent on profits and not cumulative until it had been paid out of profits for three consecutive years, and all arrears of interest and sinking fund payments on the existing 5½ per cent. stock were to be cancelled. 145,000 preference shares and 145,000 ordinary shares in the reorganized capital of Dormans were to be issued at par to satisfy 290,000*l.* of Dormans' indebtedness to its bankers. The rest of the indebtedness, save for 150,000*l.* and amounts owing on certain special accounts, was, up to 1,650,000*l.*, to carry interest at 3 per cent. for about three years, then at 4 per cent., payable out of profits only after the interest and sinking fund for the "A" and "B" 5½ per cent. debenture stocks and non-cumulative while the interest on the "B" debenture stock depended on profits, and, as to principal, was to be payable only out of half Dormans' surplus profits after the interest on the indebtedness had been paid, up to 82,500*l.* a year, and of the proceeds of sale of securities valued at about 1,110,000*l.*, which the bankers held and were entitled to realize so long as the realization did not prejudice Dormans' business. 2,500,000*l.* of 5 per cent. redeemable prior lien stock was to be created, charged on the assets to be acquired as a result of the amalgamation and the assets forming the security for the "A" and "B" 5½ per cent. debenture stocks and ranking in priority to those stocks. Subject to Dormans' and South Durham's schemes being sanctioned and coming into operation, Messrs. N. M. Rothschild and Sons had agreed to subscribe or procure subscriptions for the prior lien stock on terms producing to South Durham a minimum of 2,007,000*l.*, and Dormans were to issue forthwith 2,230,000*l.* of the prior lien stock, or any less amount required, at the issue price, to provide the 2,007,000*l.* Interest on the debenture stock was to be cancelled from November 1, 1932, to the date of the coming into operation of the scheme. After that date, interest was to be paid only to the extent that there were profits as defined in the scheme available, was to be non-cumulative, and was to become a fixed obligation of Dormans after it had been paid at the full rate on all the stock for three consecutive financial years. The debenture stockholders were to waive their rights to repayment on May 1, 1963, and to approve the cancellation of the existing sinking fund obligation and the creation of a new sinking fund to redeem the stock at par in 37 years from the end of the second financial year after the interest on the stock had become fixed. The prior lien stock was to be repayable at par on November 1, 1973, and redeemable by the sinking fund, Dormans retaining power to redeem the whole, or not less than 500,000*l.*, of it at any time on six months' notice at a premium of 5 per cent. Dormans was to be restricted from creating (except in favour of its bankers in the ordinary course of business) any charges in priority to the charge securing the prior lien stock. 1,287,930*l.* out of the proceeds received by Dormans from the issue of the prior lien stock was to be used for distribution to the debenture stock and shareholders of South Durham and as a loan to Cargo Fleet to pay off its debenture stock. The special management share was to be vested in a stockholders' committee to be formed under the scheme which, until Dormans' first payment to the sinking fund, was by virtue of that share to have the right on a poll to one vote in excess of all the other votes conferred on Dormans' issued shares. The committee and the reconstituted board of Dormans were to include the then managing director of South Durham, who was also to be Dormans' consulting expert.

Under South Durham's scheme there were to be paid, on the transfer of South Durham's undertaking to Dormans', 110*l.* cash for each 100*l.* debenture stock to South Durham's debenture stockholders, 1*l.* cash and 10*s.* in preferred ordinary shares for each 1*l.* preference share to South Durham's preference shareholders, 1*l.* in " A " 5½ per cent. debenture stock and 15*s.* in preferred ordinary shares for each 1*l.* ordinary share to South Durham's ordinary shareholders, and 10*s.* in " A " 5½ per cent. debenture stock, 10*s.* in preference shares and 7*s.* 6*d.* in preferred ordinary shares for each 1*l.* " B " ordinary share to South Durham's " B " ordinary shareholders. Cargo Fleet's debenture issues were to be redeemed and paid off at a premium of 5 per cent. out of the cash advanced by Dormans.

On June 19, 1933, the Court ordered that Dormans should convene separate meetings of its 5½ per cent. debenture stockholders, cumulative preference shareholders, preferred ordinary shareholders and ordinary shareholders, and that South Durham should convene separate meetings of its debenture stockholders, preference shareholders, ordinary shareholders, and "B" ordinary shareholders "for the purpose of considering and if thought fit approving with or without modification" the respective schemes, by advertisements as directed and by letters to the debenture stockholders and shareholders enclosing a print of the scheme and a properly stamped form of proxy in the form settled in Chambers. On June 30, 1933, a circular signed by South Durham's secretary, notice of the meetings, and proxies in the form settled in Chambers were sent to the debenture stockholders and shareholders of South Durham. The circular stated (inter alia) that ". . . . The basis upon which the negotiations for the amalgamation . . . . have proceeded has been, not on (*sic*) the book figures of the value of the assets as appearing in the balance sheets, but on the earning power of the assets to be acquired under the scheme. A revaluation of the company's assets was accordingly made on the above basis by Messrs. Peat, Marwick, Mitchell & Company, and their figures have been confirmed by Mr. Michael Faraday, the well-known valuer, and Mr. John E. James, chairman of the Lancashire Steel Corporation, Limited. . . . . Your board have investigated and considered the scheme in its entirety, and are prepared as large debenture holders or shareholders to accept the terms offered; and taking all the circumstances into consideration, and having regard to the great probability of the coming change in independent conduct of the industry, and the favour with which suitable amalgamations are viewed politically and financially, recommend their fellow debenture stockholders and fellow shareholders to accept it. . . . . The scheme also provides, upon its coming into operation, for the reconstitution of the board of Dormans, and, of your directors, Mr. Benjamin Talbot, Mr. J. H. B. Forster, and Mr. A. N. McQuistan, have agreed to join the reconstituted board, Mr. Benjamin Talbot accepting the position of deputy-chairman.

. . . . The scheme also provides for the payment by Dormans to certain of the directors of this company and of Cargo Fleet (who do not take office in the reconstituted company) of compensation for loss of office amounting to three times the remuneration received by such directors respectively for the year to 30th September, 1932. Mr. Benjamin Talbot has also agreed that on the scheme coming into operation he will act as consulting expert to the reconstituted company (subject to determination at his option by six months' notice) at a remuneration of 5000*l.* a year free of tax. In the event of his retirement he will be entitled to a pension at the same rate, but subject to deduction of tax, in consideration of his past services and those which it is anticipated he will render. . . . . The articles" (a new set of articles, to be adopted in view of the alterations necessitated by the scheme, and to embody the alterations effected by the Companies Act, 1929) "will provide for remuneration to the directors at the following rates: The chairman 3000*l.* per annum. The deputy-chairman 2000*l.* per annum. Each vice-chairman 1500*l.* per annum. Each of the remaining directors, 500*l.*" The chairman was to be Mr. Charles Mitchell, the then chairman of Dormans, and the vice-chairmen two of the then directors of Dormans. The circular concluded: "It is urgently requested . . . . that if you are unable to attend personally you will complete and sign the respective proxies for debenture stock or shares which you may hold and return to (*sic*) the company . . . . so that they may arrive not later than 12 o'clock noon on Saturday the 15th July next. Your particular attention is invited to the instructions set out in the proxies as to their due completion." Four forms of proxy, in the form settled in Chambers, for the debenture stockholders, preference shareholders, ordinary shareholders and "B" ordinary shareholders respectively, were enclosed with the circular. Each stated that the stockholder or shareholder, as the case might be, appointed "The Right Honourable Viscount Furness, ... or, failing him, Benjamin Talbot, ... or, failing him, Sir William Henry Peat, K.B.E., as proxy to act for at the meeting . . . . to be held on . . . . the 19th day of July, 1933, ... for the purpose of considering and, if thought fit, approving, with or without modification, the proposed scheme of arrangement referred to in the notice convening the meeting, and . . . . to vote for and in name the said scheme, either with or without modification as proxy may approve." Opposite the blank immediately before the words "the said scheme" was a marginal note: "If for insert 'for'; if against insert 'against' and strike out the words after 'scheme' and initial such alteration." At the foot of the proxy were the following notes: "This proxy must be signed and lodged with the secretary at the registered office of the company . . . . not later than 12 o'clock noon, on Saturday, the 15th day of July, 1933. . . . . If unable to attend the meeting in person, please complete and return this form in the envelope herewith by the time stated." Messrs. Peat, Marwick, Mitchell & Co.'s report, described in the circular as "a revaluation of the company's assets," was dated August 9, 1932.

On July 3, 1933, a circular signed by Dormans' secretary, notices of the meetings ordered by the Court of Dormans' debenture stockholders and shareholders, proxies in the form settled in Chambers, and voting cards, were sent to Dormans' debenture stockholders and shareholders. The circular stated (inter alia) that "The restriction in the volume of trade has been so severe and prolonged that many of your plants and properties have been unable to be worked for a considerable period and in consequence there has been serious depreciation in the value of the fixed assets of the company. The whole of the assets have, therefore, been revalued upon the basis of their earning power; and this revaluation has been confirmed by the well-known valuer, Mr. P. Michael Faraday and by Mr. John E. James, chairman of the Lancashire Steel Corporation, Limited. . . . . The directors have consulted representatives of the insurance companies and investment trust companies who are substantial holders of the 5½ per cent. debenture stock and shares of your company and they consider that the only alternative to the scheme now submitted is the appointment of a receiver. The terms of the scheme have been referred to the trustees for the stockholders, who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders. . . . The bankers of the company have agreed that upon the scheme coming into operation they will accept the allotment credited as fully paid up, of 145,000 6 % preference shares and 145,000 preferred ordinary shares of 1*l.* each in the reorganized capital of the company in satisfaction of 290,000*l.* of the company's indebtedness to them and will permit the balance of such indebtedness (exclusive of certain sums) to remain outstanding up to but not exceeding 1,650,000*l.* with the benefit of certain securities at present deposited with or on behalf of the bankers. Interest will be payable on the amount outstanding at the rate of 3 % per annum for the remainder of the financial year then current and for the two next financial years and thereafter at the rate of 4 % per annum. The bank interest will only be payable out of profits available as defined in the scheme and will be non-cumulative until the interest on the 5½ % debenture stock becomes fixed. One-half of the profits available after the payment of bank interest will be used to repay the bankers, but the company will not in any year be required to repay more than 5 % of the original amount permitted to remain outstanding." The four forms of proxy, for the debenture stockholders, preference shareholders, preferred ordinary shareholders and ordinary shareholders were substantially in the same form as those sent out with South Durham's circular, the date of the meetings being July 27, 1933, the chairman was to be Charles Mitchell, or failing him the Hon. Roland Dudley Kitson, or, failing him, Arthur Dorman, and the proxies were to be signed and returned not later than 6 o'clock in the afternoon on July 25, 1933. Along the side of each voting card was written, in red ink, "If you are voting as proxy for other holder(s) please write the name (*sic*) of holder(s) on the back of this card."

On July 3, 1933, Mr. Arthur Hyde, a shareholder in South Durham and Cargo Fleet, sent to the shareholders in those two companies a letter expressing the opinion that South

Durham's proposed scheme would not be to their advantage and that their interests lay in the independent continuance of the companies, and asking them not to sign proxies in favour of the resolutions for amalgamation and not to take any action until they received a second letter from him. In the second letter, dated July 10, 1933, he stated his views more fully. The letter concluded "If . . . . you share my views but cannot attend the meetings it is of the utmost importance that you sign and return to me by return of post in the enclosed envelope the proxy or proxies appertaining to the different classes of shares held by you in the South Durham Company." Enclosed with the letter were forms of proxy for use by preference shareholders, ordinary shareholders and "B" ordinary shareholders.

The meetings of the debenture stockholders and shareholders of South Durham were all held on July 19, 1933. At the preference shareholders' meeting certain proxies were rejected by the chairman as invalid, including 270, representing 41,319*l.* of shares, purporting to appoint Mr. Hyde or Mr. Charles Carter proxies. At the ordinary shareholders' meeting the proxies rejected by the chairman as invalid included 502, representing 60,246*l.* of shares, purporting to appoint Mr. Hyde or Mr. Carter. At the "B" ordinary shareholders' meeting the proxies rejected by the chairman as invalid included 544, representing 43,302*l.* of shares, purporting to appoint Mr. Hyde or Mr. Carter. The proxies purporting to appoint Mr. Hyde or Mr. Carter were rejected as being in a form different from that settled in Chambers in that they expressly directed Mr. Hyde or Mr. Carter as proxy to vote against the scheme and did not leave it to the donor to direct whether the proxy should vote for the scheme, with or without modification, or against it. By his report dated August 8, 1933, the chairman reported that, on the basis of proxies not in accordance with the form settled by the Court being excluded, the scheme was carried by the requisite statutory majority, and that, if those proxies were admitted, there would be a majority in number, but not the three-fourths majority in value.

On July 19, 1933, a committee of debenture stockholders of Dormans who were opposed to that company's scheme, and among whom was Mr. Arthur Reginald Linsley, a director of T. Linsley & Co., Ld., a company holding 3202*l.* 5½ debenture stock, and the authorized representative of that company at debenture stockholders' meetings, sent a circular to all holders of 200*l.* of debenture stock or more, asking them to vote against the scheme. There were about 9000 stockholders on the register, and the circular was sent to about half of these, there being neither time nor money to send it to more. Many of those who received it had by then lodged proxies in favour of the scheme, and in reply to it Mr. Linsley's committee received many letters from stockholders saying that they wished to revoke their proxies and vote against the scheme, some saying that they feared it would be too late.

The meetings of the debenture stockholders and shareholders of Dormans were all held on July 27, 1933, with Mr. Charles Mitchell, chairman of Dormans, in the chair. At the meeting of the debenture stockholders 4237 persons, representing 2,902,811*l.* of stock, were present and voted in person or by proxy, 167, together holding 152,492*l.*, being present in person, and 4070, together holding 2,750,319*l.*, being present by proxy. Mr. Linsley attended the meeting and spoke, giving the opposing stockholders' grounds of objection and reasons for opposing the scheme. Voting cards with the red ink side-note had been handed to those attending the meeting as they entered the room. Other speakers followed Mr. Linsley, and the chairman, Mr. Mitchell, then asked that those present would record their votes either for or against the scheme, on the cards. Mr. Linsley stated in an affidavit that he was given no instructions with his card, that the meeting appeared to desire a show of hands before the vote was taken, and that he took the vote, by request, on the chairman's refusal to do so, declared the resolution approving the scheme lost, and saw that the chairman was leaving the room. The affidavit went on to state that Mr. Linsley, unable himself to answer the questions, which some of those present were by that time asking, what was to be done with the cards and to whom they were to be given, asked the chairman to return and answer them. The chairman ignored the request and, when Mr. Linsley and another were proposed and seconded as scrutineers, left the room. About ten persons gave their cards to Mr. Linsley and asked him to give them to the proper person. Mr. Linsley, the affidavit continued, spoke to one of those present, who said: "What business have you with those cards?" and snatched the cards from him. Mr. Linsley wrote some days later to Dormans' solicitors, asking what arrangements had been made for a scrutiny of the votes and was informed that a scrutiny would not be allowed. By his report dated August 10, 1933, Mr. Mitchell reported that, at the meetings of the debenture stockholders and all classes of shareholders, resolutions approving the scheme without modification were passed.

A report, dated November 6, 1933, on South Durham's scheme and circular, was prepared on behalf of Mr. Hyde, by Mr. Henry Morgan, incorporated accountant, who also considered Mr. Hyde's circular.

The petitions came on for hearing together on November 22, 1933, Dormans' petition being heard first, and being opposed by the debenture stockholders of whose committee Mr. Linsley was a member. Mr. Mitchell, giving evidence during the hearing of Dormans' petition, denied that he left the debenture stockholders' meeting before the vote was taken, and said that he left it a short while after, having declared the meeting closed. Evidence given by another witness denied that the statements made about the meeting by Mr. Linsley in his affidavit were accurate. South Durham's petition was opposed by Mr. Hyde.

Wilfrid A. Greene K.C., *W. P. Spens K.C.* and *D. Ll. Jenkins* for Dormans. The petition is being opposed by certain debenture stockholders on the grounds that the scheme is unfair to the $5\frac{1}{2}$ per cent. debenture stockholders, that there were irregularities at the meetings, and that certain proxies which were lodged after the time fixed by the Court ought to have been admitted.

The evidence shows that the method of filling in the voting cards was adequately explained, that the arrangements for collecting them were also adequate, and that there is no foundation for the suggestion that the result of the meeting was affected to any appreciable degree by debenture stockholders who attended the meeting failing to record their votes. The scheme has been approved by the requisite majority.

H. A. H. Christie for opposing debenture stockholders of Dormans. The resolutions were not properly passed by the requisite majorities. Had proxies lodged after 6 P.M. on July 25, 1933, been admitted, the opposing debenture stockholders could have defeated the scheme. Alternatively, reliance is placed on the fact that the chairman left the meeting before the vote was taken: no vote could be taken in the absence of a presiding officer. Should both those points prove unacceptable to the Court, the opposing debenture stockholders will wish to oppose the scheme on its merits.

Their first objection is on the question of the admission or exclusion of the votes against the scheme. Voting by proxy on a scheme of this nature is not governed by any statutory provision or any rule of Court: it is left to the common law. Sect. 153 of the Companies Act, 1929, provides simply that people may vote by proxy. In the present case, the Court has not by its order limited voting by proxy to a particular method. It has merely imposed on Dormans the obligation to send out to the debenture stockholders what is considered to be a convenient form of proxy: the Court has in no way purported to interfere with the debenture stockholders' rights.

[MAUGHAM J. What is the object of the provision that the proxy must be lodged not later than 6 P.M. on July 25, 1933?]

The object is that the proxies may be checked before the meeting so that the chairman can come to the meeting knowing exactly how he stands.

In *In re English, Scottish, and Australian Chartered Bank* (1), it was emphasized that there was no special virtue in the actual form of proxy. The form now in use was settled by

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(1) [1893] 3 Ch. 385.

Vaughan Williams J. (as he then was) in a practice direction. (1) That was referred to by Swinfen Eady J. (as he then was) in another practice direction. (2) The opposing debenture stockholders' vital objection to the scheme is that it is not Dormans' scheme at all, but has been devised solely in the interests of Barclays Bank Ld., who have thoroughly failed in their duty as trustees and have used their position to induce Dormans to adopt a scheme which is particularly favourable to them and secures to them payment of the greater part of their unsecured debt. In September, 1932, they were creditors for 1,830,470*l.* The opposing debenture stockholders ask the Court not to sanction the scheme in any way.

F. Ashe Lincoln for a group of debenture holders of Dormans.

Wilfrid A. Greene K.C. and *W. P. Spens K.C.* in reply. The Court has jurisdiction to decide all matters relating to the manner in which a meeting shall be conducted, and has power to direct what may be called the machinery of these special meetings. The order in the present case has purported to direct that proxies shall be deposited within a specified time, a direction which the Court has power to make under s. 153 of the Companies Act, 1929. It has been the practice to make the provision as to depositing within a specified time for many years.

[MAUGHAM J. But nearly always in the case of companies in winding up.]

There has never been any distinction drawn, under s. 120 of the Companies (Consolidation) Act, 1908, between companies in winding up and companies not winding up. The same procedure has been followed and the same form used, and it has been settled in Chambers in precisely the same way.

[MAUGHAM J. But the question whether the proxies are in proper form or not has not yet been the subject of judicial decision.]

That is so, but the practice notes have not drawn any distinction between them.

[MAUGHAM J. What authority has the Court, under s. 153

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(1) [1896] W. N. 56.

(2) [1910] W. N. 154.

of the Companies Act, 1929, to say that a man shall not send a general proxy to a meeting, somebody to vote on his behalf as he thinks fit ?]

In *In re English, Scottish, and Australian Chartered Bank* (1) Vaughan Williams J., as he then was, said : " . . . . I think that the Court has an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies shall be evidenced, and to determine all such questions as whether it is necessary that the proxy should be produced at the meeting." The Court of Appeal did not dissent from that.

[MAUGHAM J. No, but they assented to it only on the authority of s. 91, now s. 288 of the Companies Act, 1929, dealing with the Court's powers with regard to meetings to ascertain the wishes of creditors and contributories.]

The suggestions against Barclays Bank Ld. cannot really have very much foundation if the Court considers how many people have had to consider the scheme and the fairness of it. It has had to be considered also by South Durham's board, to whom it is of no interest whatever to come into a scheme which is giving any unfair advantage to any particular bank ; nor is it of interest to Messrs. N. M. Rothschild & Sons that the scheme should have in it anything unfair with regard to Barclays Bank Ld. There was adequate disclosure to all the debenture stockholders of the exact effect which the scheme was going to have on Dormans' bankers and on the debenture stockholders themselves.

Wilfrid A. Greene K.C., *W. P. Spens K.C.* and *W. Gordon Brown* for South Durham. The Court's order prohibited by implication the use of proxies in any form other than that settled in Chambers : *In re Magadi Soda Co.* (2)

If the Court directs further meetings in the case of South Durham, the correct procedure will be to stand the petition over for the meetings to be convened. That leads at once to the questions whether South Durham's circular is sufficiently informative or whether it contains mis-statements. Those questions will have to be considered in deciding what the

(1) [1893] 3 Ch. 385, 395.

(2) [1925] W. N. 50.

procedure at any future meeting should be. If further meetings are directed, some sort of circular will have to be sent out.

Fergus D. Morton K.C. and *M. L. Gedge* for Mr. Hyde. The proper course is to dismiss the petition without calling any further meetings at all: Buckley on the Companies Act, 11th ed., p. 320. The scheme has been rejected, the statutory majorities not having been obtained. On the evidence, it is not such a scheme as a man of business would reasonably approve. The Court still has the function of determining whether a scheme is such as a man of business could or would or might reasonably approve: *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (1) That is a case under the Joint Stock Companies Arrangement Act, 1870, but it is still the leading authority on what is now s. 153 of the Companies Act, 1929. In 1930 and 1932, the attitude of South Durham's board was definitely against amalgamation. Its present attitude is very different. The board itself is very well looked after in the scheme. It has had a sudden recent conversion to this amalgamation. What is called, in South Durham's circular the " re-valuation " of the company's assets is not a revaluation really, and the " confirmation " by Mr. Faraday and Mr. James was not, and was not intended to be, a confirmation at all. The figures are quite useless as a calculation of earning power, because they make the wholly unjustifiable assumption that there will be a speedy return to the favourable business conditions of 1929. As to the proxies, where there is no winding up, s. 153 of the Companies Act, 1929, does not give the Court power to impose limitations on the right to vote by proxy. It is only by having recourse to s. 288, the section corresponding to s. 91 of the Companies Act, 1862, which the Court of Appeal considered in *In re English, Scottish, and Australian Chartered Bank*, (2) that a limitation can be imposed on the power to vote by proxy and a particular form of proxy be prescribed. Also, the Court's order in the present case does not prevent a shareholder from using another form of proxy if he thinks fit: and every shareholder who gave his proxy to Mr. Hyde really did exercise his discretion against the scheme. In *In re Magadi Soda Co.* (1) there was a winding up, which here there is not: and in that case Eve J. rejected the proxies because there the shareholder delegated his discretion to the proxy. Here the proxies are valid and the Court has no power to order fresh meetings. If, however, the Court holds that the proxies are invalid, the petition should be dismissed on the grounds that there is a strong body of opinion against the scheme, and that the scheme cannot go through unless Dormans' scheme goes through.

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(1) [1891] 1 Ch. 213.

(2) [1893] 3 Ch. 385.

Roger Turnbull for Boughton Estates, Ld., mineral lessors of South Durham.

Wilfrid A. Greene K.C. in reply. The attack on the single-mindedness of South Durham's board is unjustifiable, and there is no foundation for the assertion that, in favouring amalgamation, it was showing a sudden conversion. The reports for 1930, 1931 and 1932, show that that is contrary to the facts. As to the auditors taking the year 1929, they found that the companies had been working on a concentration of output scheme based on that year, and they took the work of that scheme as the basis for their own study. It was essential to obtain a fair comparative basis of valuation, and there could be nothing unfair to South Durham in taking a basis common to both companies, which was what the auditors did: and their doing so was approved by the boards of both companies. As to the objection to the use in the circular of the word "re-valuation," what was so described was a process of finding out what the business was worth: it was a valuation on the basis of earning capacity. Also, the word "confirmation" accurately describes what Mr. Faraday and Mr. James did. They did not, it is true, confirm the figures in the sense that they went through their calculations on the same basis and produced the same result. They faced the problem from the point of view of a practical man, and the result can fairly be described as a confirmation. The Court has full jurisdiction to direct that the petition shall stand adjourned and, pending the adjournment, to order

(1) [1925] W. N. 50.

that fresh meetings shall be called. The Court is not bound to dismiss the petition and put all the parties to the expense of starting all over again. In *In re United Provident Assurance Co.* (1), a case in which another petition was presented and yet fresh meetings were not ordered, the position was different. If the present petition was dismissed, there would be a summons on which South Durham, on the basis of *In re United Provident Assurance Co.* (1) could ask for an order for a meeting, not of the classes who had, but only of those who had not approved the scheme, and, if their approval was obtained, would rely on the approval of the classes who passed the scheme on the old summons, and of the opponents on the old summons who passed it on the new one. The Court is not compelled to put the parties to that expense. The Court is asked here to adjourn the petition and direct fresh meetings to be held.

MAUGHAM J. There are two petitions before me, the first relating to Dormans' case and the second to South Durham's case. Each of them is presented under s. 153 of the Companies Act, 1929. I will first state my view as to the function of the Court in determining whether the compromise or arrangement should be sanctioned by the Court. It is plain that the duties of the Court are two-fold. The first is to see that the resolutions are passed by the statutory majority in value and number, in accordance with s. 153, sub-s. 2, at a meeting or meetings duly convened and held. Upon that depends the jurisdiction of the Court to confirm the scheme. The other duty is in the nature of a discretionary power, and it has been the subject of two decisions in the Court of Appeal, the first being the case of *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (2) and the second the case of *In re English, Scottish, and Australian Chartered Bank.* (3) In the first of these cases, it is true, Lindley L.J. observed (2): "The Court must look at the scheme, and see . . . . whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it." I think that those phrases, which were contained in a judgment which had not been reserved, do not represent exactly what the Lord Justice intended. I prefer, as representing the view of the Court of Appeal, the language in the statement of Bowen L.J. that (1) " A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it," and he added, to explain that, " . . . . I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, ..." Fry L.J. said (2): " . . . . the Court . . . . must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it." In *In re English, Scottish, and Australian Chartered Bank* (3) Lindley L.J. does not seem to have had his attention drawn to the fact that what he had said in *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (4) was not quite the same as what Bowen and Fry L.JJ. had said; but he plainly approved of what Bowen and Fry L.JJ. had said, for he so stated, and he quoted what Fry L.J. had said. (5) He also said this (6): "If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. . . . . While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, ... the Court ought to be slow to differ from them."

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(1) [1911] W. N. 40.
(2) [1891] 1 Ch. 213, 239, 243.
(3) [1893] 3 Ch. 385.

(1) [1891] 1 Ch. 213, 239, 243.
(2) [1891] 1 Ch. 213, 247.
(3) [1893] 3 Ch. 385, 408, 409.
(4) [1891] 1 Ch. 213, 239.
(5) [1893] 3 Ch. 385, 408.
(6) Ibid. 409.

In my opinion, then, so far as this second duty is concerned, what I have to see is whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The schemes before me are attacked on both grounds. It is said that the resolutions have not been duly passed and that the Court in considering the nature of the schemes ought to come to the conclusion that a reasonable business man would not approve of them.

I now turn to consider, with regard to Dormans, the question whether the resolutions have been duly passed. I observe by way of preliminary that huge sums are involved. Large sums are often involved in the schemes of arrangement which come before this Court for confirmation, and the Court has found it necessary to protect shareholders and creditors alike in connection with such schemes. It may be observed that when the Joint Stock Companies Arrangement Act, 1870, was passed, in the majority of cases all the persons concerned with an arrangement could go to the meeting, listen to what was said and vote for or against the arrangement according to the views which they were persuaded to take. In these days, in many of the cases that come before me, only a fraction of the persons who are concerned can get into the room where the meeting is proposed to be held, and in the great majority of cases the proxies given to the directors before the meeting begins have in effect settled the question of the voting once for all. It is perhaps not unfair to say that in nearly every big case not more than five per cent. of the interests involved are present in person at the meeting. It is for that reason that the Court takes the view that it is essential to see that the explanatory circulars sent out by the board of the company are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote. I am assuming, of course, that, following the usual procedure, explanatory circulars are sent out, because, I may observe, there is nothing in the Act to render them essential. In a sense, in all these cases, the dice are loaded in favour of the views of the directors: the notices and circulars are sent out at the cost of the company, the board have had plenty of time to prepare the circulars, all the facts of the case are known to them, proxy forms are made out in favour of certain named directors and, although it is true that the word " for " or " against " may be inserted in the modern proxy form, the recipients of the circulars very often are in doubt as to whether the persons named as proxies are bound to put in votes by proxy with which they are not in agreement. If we contrast with that position the position of a class of objectors, it is to be observed that a member of the class who receives a notice of the meeting and a circular from the directors is generally alone: he has no funds with which to fight the case and he has no information, except, sometimes, that information which has been contained in reports and balance sheets which have probably long ago been relegated to the waste paper basket. In any case, he has a minimum of information, his personal interest in the matter may be exceedingly small, probably he knows few persons in the same position as himself and, if he manages to get into touch with them, they together have to raise funds for the purposes of an opposition, which is often an expensive matter. They have then to get the names and addresses of the members of the class who are concerned, and to frame and send out a circular representing their views. Very often there is scarcely sufficient time for those purposes between the moment when the notice of the meeting reaches objectors by post and the date of the meeting. Proxies sent out by the directors can easily be lodged forty-eight hours before the meeting. It is quite plain that opponents may find it most difficult, after they have come together and have raised the necessary funds and have agreed on a circular and have sent out their notices, to lodge such proxies as they may have been able to obtain forty-eight hours before the meeting.

In my opinion the Court ought to bear in mind these considerations when it has before it, as it often has, a case where the whole matter is really determined by the proxies that have been given before the meeting is held. They should also be borne in mind in relation to the important point, one of far-reaching importance in many cases besides this one, as to the power of members of the class to vote by proxy. Sect. 153 simply says that a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, may agree to a compromise or arrangement. It is wholly silent as to the nature of the instrument appointing the proxy. We all know that there are two forms in use: there is a general proxy which may appoint a person to vote as he may think fit, and there is a special proxy which may be a proxy to vote for or against, as the case may be, a particular resolution. In what I am going to say in reference to proxies and proxy forms I am confining my observations to the cases before me—namely, to the cases where the companies are not in winding up, where there is no rule of Court applicable to the matter, and where neither the articles of association of the company nor the provisions of the trust deed to secure debentures have any application. It may be pointed out that in 1870 a proxy was simply an agent to vote: no deed was necessary for the appointment of such an agent; he could be appointed in writing in any form which sufficiently denoted the name of the person who was to vote and the person who appointed him, and then I think the matter was left at large except, perhaps, to this extent, that, having regard to the nature of the meetings contemplated, it seems to be a reasonable inference that the instrument must be one in writing. The power of the Court in terms is simply "to summon the meetings in such manner as the Court may direct."

I have now to consider certain authorities. The case of *In re English, Scottish, and Australian Chartered Bank* (1) to which I have already referred, is one in which the Court of Appeal had to consider whether certain novel forms of order, which involved proxies being given in London by persons living in Australia, were invalid. Vaughan Williams J., as he then was, who had himself, I think, invented the order, observed:

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(1) [1893] 3 Ch. 385, 395.

" . . . . I think that the Court has an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies shall be evidenced, and to determine all such questions as whether it is necessary that the proxy should be produced at the meeting." When the matter, however, went to the Court of Appeal, it is to be noted that Lindley, Lopes and A. L. Smith L.JJ., I may say, pointedly abstained from taking that view. It was a case where the company had been ordered to be wound up in this country and all three of the Lords Justices expressly stated that in their opinion the authority of the Court to make this kind of order was derived from s. 91 of the old Companies Act of 1862, which was the Act then in force. Sect. 91 (now reproduced as s. 288, sub-s. 1, of the Companies Act, 1929) provides: "the court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence, and may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court." The Court of Appeal considered that that provision, read in conjunction with the Joint Stock Companies Arrangement Act, 1870, justified the Court in making an order providing for special forms of proxies.

There are two practice notes which further have to be considered. In the first one (1), Vaughan Williams J. directed that "Proxy papers to be used at meetings to consider schemes of arrangement under the Act of 1870" (i.e., the Joint Stock Companies Arrangement Act) "should follow the office-form settled by the judge, which empowers the proxy 'to vote for me, and in my name [blank] the said scheme, either with or without modification as my proxy may approve,' and contains opposite the blank a marginal note as follows: 'If for, insert "for." If against, insert "against," and strike out the words after "scheme" and initial such alterations.'" Plainly that is a direction in reference to companies in winding up, because the Joint Stock Companies Arrangement Act, 1870, referred only to those cases. A good many years later Swinfen Eady J. directed that (1) "In order to insure the issue of proper forms of proxies for meetings ordered to be summoned under s. 120 of the Companies (Consolidation) Act, 1908,"—dealing with power to compromise with creditors and members and reproducing s. 2 of the old Joint Stock Companies Arrangement Act, 1870—"the order directing the meeting to be summoned should invariably provide that 'the proxies are to be in the form officially authorized by Vaughan Williams J. in the Practice Direction [1896] W. N. 56, or in such other form as may be settled in chambers.'" It is impossible from that to be sure whether the learned judge was intending his remarks to be confined to cases where the company was in compulsory or voluntary winding up or whether he thought it was a proper direction to give in all cases. Sect. 120 of the Companies (Consolidation) Act, 1908, provided that the power to approve a scheme could be exercised whether or not the company was in winding up. I do not find that either in the order of the Court directing meetings to be summoned, or in the form of proxies settled in Chambers following the practice notes that I have referred to, there is anything to preclude a member of the class from making use of such proper proxies, general or special, as he may be advised. In my opinion s. 153 gives a general right of voting by proxy, and the decision of Eve J. in *In re Magadi Soda Co.* (2), confined as it was to cases where the company was in winding up, in no way leads me to doubt the conclusion on this point at which I have arrived. It is not open to the Court by practice notes—which have no statutory force and very little judicial force, as they are directions given without argument—to preclude people who are given a statutory right to vote by proxy from so exercising their vote. The power to summon a meeting involves a power to fix the date of the meeting, the chairman, and the form of the notice.

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(1) [1896] W. N. 56.

(1) [1910] W. N. 154.

(2) [1925] W. N. 50.

It may also involve a power to direct and settle a form of notice to be sent out at the expense of the company by the people who are asking the Court to summon a meeting under the section. It does not, in my opinion, either expressly or by implication, direct that no other proxy form can be used. It should be added that some of the class may desire to approve the scheme, subject to a specific modification. I do not see why they should be precluded from doing that by a form of proxy which specifies the modification which they desire. It is true that in the proxy form as settled by the Court there is a reference to a possible modification. In that case the directors or other persons to whom the proxies are to be given will apparently be entitled to use their own judgment in the matter, and that may be precisely the thing which the person giving the proxy does not desire. I may mention as an illustration that the scheme may, as one of the schemes before me does, give compensation to directors for what is called loss of office. I can conceive members of the class wishing to vote in favour of the scheme only if it omitted that provision. In order to do that, if they cannot attend the meeting themselves, they must make out a special form of proxy.

A somewhat different question arises as to the time at which lodgment of the proxies should have been made. It is not necessary for me to decide whether, when the office form of proxy is used, it must be lodged within the time mentioned in the note on the proxy or it will be bad, though I may add that I see grave objection to the view that if lodged too late it will be bad. I can at least see no sufficient ground for holding that the notes on the form settled in Chambers which, so far as I can see, are not notes made with any judicial authority, preclude other forms from being used if first presented at the meeting itself. As I have already said, I can see no objection to a general form of proxy being used, that is to say, a proxy by which a person appoints another member of the class to represent him or her at the meeting, to listen to all that is said on both sides, and then to vote as he or she may think proper having regard to what was said. I have no doubt that that was constantly done in the old days when the Act of 1870 was in force. I am not prepared, for example, to hold that a wife may not appoint a husband on her behalf to go to the meeting to listen to what is said and to vote accordingly. Further, it does not seem to me that there is any sufficient ground for holding that a member of the class may not use a proxy form with the printed word "against" or the printed word "for" filled up before the proxy form is handed to him. Sect. 153 affords, I think, no justification for such a view. On the other hand, I agree that when the directors are sending out a proxy form pursuant to the direction of the Court and at the expense of the company it is highly expedient that they should not fill up the form, but should leave it to be filled up by the creditors or shareholders who are concerned.

I only have to mention finally with regard to this question of proxies an argument from convenience. It is said that it will be in the highest degree inconvenient if the persons in charge of a meeting are not able to ascertain before the meeting commences what number of proxies have been lodged for or against the resolution. That is an argument at best of an exceedingly weak character. One does not deprive people of their rights merely because there may be difficulty and inconvenience in determining immediately after the meeting whether a resolution has been passed or not. In this particular case I think the argument has no weight at all. I can quite understand that in cases where a company is a going concern and where there is a series of resolutions presented to the shareholders, it may be very convenient or even necessary that the result of one resolution should be definitely determined at once and that may also be so in regard to some meetings of a company in liquidation. In a case like the present one, where the question is whether members of a class intend to vote for or against a scheme, I can see no real reason why the proxies should be lodged in time to enable the chairman before the meeting commences to know the result of the meeting, and I can see the disadvantages of such a course. Sitting here I have come across several cases where members of the class have come to a meeting and have been told by the chairman that whatever they say and however they vote he has in his pocket sufficient proxies to carry the resolution, and in many cases my belief is that members of the class have then gone away without voting at all, so that the Court has no reliable evidence as to the strength of the opposition. In my opinion proper proxies may be used at the meeting whether lodged before it or not. There has been a good deal of discussion, in Dormans' case, on the question whether the meetings were properly held under the chairmanship of Mr. Mitchell, and whether in any case the resolution ought not for that reason to be regarded as not having been properly passed. The evidence was conflicting. The voting was by cards which I do not think were in a satisfactory form, and the chairman left the meeting before the cards had been counted. That, I think, is a matter of very little importance. It is more serious to consider the contention that he left the meeting without explaining to the various people to whom cards had been given how to fill them up. It is true it is suggested that anybody who could read would be very well able to fill up the cards in the light of the instructions that were given upon the cards. It is, however, to be noted that the chairman himself did not comply with the instructions on the card and, according to the argument at one time put forward, the whole of the votes given by the directors in favour of the scheme ought to be rejected. I did not accept that argument, and perhaps I ought to say at once that I think directors who, pursuant to the order of the Court, get proxies for or against the scheme, have no option as to whether or not they will use them. My opinion is that as the result of the Court's order they are bound to use them. No discretion is vested in them in that matter, and the people who give them are entitled to assume that the proxies will be used. It is true it would be difficult to allow the proxies to have force if none of the persons named as proxy holders attended the meeting. There is an old authority that you can only vote by proxy if you are a member of the class concerned, and with that authority

I do not intend to interfere, but the persons named are persons as regards whom the registrar has been satisfied that one or other of them will be present. Subject to that one possible event of none of them being there, the proxies must be used. However, this question as to how the meeting was conducted does not seem to me to lead to any result, since it appears that, in the event, the great majority of persons who had given proxies were taken to have voted at the meeting; nor do I think, having regard to what I am going to say on the other matters which are involved in Dormans' petition that it is in the least useful to consider whether, on any of the grounds alleged, the meeting itself was not properly conducted; but to avoid misconception I will add that I am quite satisfied, after having seen him in the box, that the chairman intended to conduct and did his best to conduct the meeting in a perfectly fair and proper manner.

I now pass to an important question—namely, the question in relation to the explanatory circular sent out by the directors. I think I have already observed that there is no obligation under the Act to send out such a circular at all. Perhaps I may remark in passing that that is an additional reason for coming to the conclusion that a member of a class has a right to appoint a general proxy because, if no explanatory circular is sent, he may be quite unable to understand or form an opinion as to which way he should vote in the matter without attending the meeting, which, in a case such as I have here, is an impossible course, since there are 9000 stockholders of this particular class. Of course, there is not a room in the Cannon Street Hotel (where the meetings were held), and probably there is not a room in London, where they could attend and vote. The practice being to send out an explanatory circular in such a case, it is, in my opinion, the duty of the Court very carefully to scrutinize the circular when the matters involved are matters of considerable difficulty and doubt. In a case of great complexity it is true that not every relevant fact can be stated. I apprehend that if the circular were to assume such a length as to state all the relevant facts in Dormans' petition it would be so

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lengthy as to defeat its own object. That is not to say, however, that the creditors or the members of the class concerned ought not to expect such a statement of all the main facts as will enable them to exercise their judgment on the proposed scheme. I am prepared to believe that there are cases where even this is impracticable, but I hesitate to accept the view that if it is impracticable, s. 153 cannot be applied. I am not sure that it is the only alternative, but there is one obvious alternative in such a case and that is to let the class concerned appoint one or more persons on their behalf to investigate and consider the matter and to report to them. If that were done the explanatory circular might consist merely of the report of the committee so appointed. The present case (I am dealing with Dormans) is one of singular complexity. It involves in the first place a reduction of capital to the amount of 9,497,468*l.* Then it involves an amalgamation—I am using the popular phrase here—of the undertaking of the company with South Durham's undertaking, an amalgamation in relation to which the Court is asked to exercise certain powers under s. 154 of the Act. It involves a drastic alteration of the rights of the 5½ per cent. debenture stockholders, holders of over 5,000,000*l.* in debentures and, as if those difficulties were not enough, we have the remarkable feature that Dormans owed last week no less than 2,420,000*l.* odd to the four banking companies who have been financing it, that very large sum being secured to the extent of only 1,715,000*l.* odd. Another circumstance is that Dormans cannot pay the interest due to its 5½ per cent. debenture stockholders, whilst, on the other hand, South Durham, notwithstanding the unexampled depression in the steel and iron trade, is in a flourishing condition at the present time.

Before dealing with the petition itself, I may say that in my opinion it has been clearly established that the position of the shareholders may fairly be described as desperate. The total share capital is 11,248,146*l.*, and that is proposed to be reduced to 1,750,678*l.* by cancellation of lost capital. That alone is sufficiently serious, but the more vital point is that the company at present is commercially insolvent in that it cannot pay its debts as they become due. The position is that the banks may at any time refuse facilities to the company and, on the other hand, any one of the holders of the 5½ per cent. debenture stock may apply for a receiver. Those facts are not in dispute and they have to be borne in mind in considering some of the arguments which have been addressed to me. It should be added that there are 883,918 6 per cent. cumulative preference shares of 1*l.* each carrying the right to a cumulative preference dividend and priority with regard to return of capital, but without any further right of participation: there are 2,052,746 8 per cent. preferred ordinary shares of 1*l.* each, carrying the right to a fixed non-cumulative preferential dividend at the rate of 8 per cent. per annum and ranking pari passu with the ordinary shares as regards return of capital and participation in the surplus assets on a winding up: and finally there are 8,311,482 ordinary shares of 1*l.* each. So much for the share capital. There are 4 per cent. first mortgage perpetual debentures to an amount of 400,000*l.* with a first specific charge on the freehold premises mentioned in a certain trust deed and a floating charge upon all other property and the undertaking of the company with certain exceptions. Their rights are not affected by the scheme. Then we come to the 5½ per cent. debenture stock: that amounts to 5,135,944*l.* debenture stock secured by a trust deed dated July 26, 1923, under which Barclays Bank Ld. are the trustees and, stating it very shortly, the stockholders have a specific charge subject to the specific charge securing the 4 per cent. first mortgage debenture stock and a floating charge upon the undertaking and other property of the company with certain exceptions, subject as to part of such property to the floating charge given to the first mortgage debenture stock.

As everybody knows, the company since its incorporation in 1889 has carried on business as the owner of coal and ironstone mines, blasting furnaces, steel works, constructional works, and a number of other plants, and it has a controlling interest in a number of companies, including Redpath, Brown & Co., who have large interests, and other concerns. For the purpose of economy of time I propose to treat myself as having read paragraphs 13 to 15 inclusive of the petition, which state and, I think, state fairly, the position of the company and its operations as the result of the very serious depression in the coal, steel, iron and allied trades, and the depreciation in consequence of the fixed assets of the company. Para. 16 states: "With a view to the unified control of practically the whole of the iron and steel industries of the Tees-side area of the north-east coast, a provisional agreement dated June 15, 1933, was entered into between the company and the South Durham Steel and Iron Co., Ld., for the acquisition by the company of the whole of the undertaking and assets of the South Durham Steel and Iron Co., Ld., These assets include upwards of 98 per cent. of the share capital of Cargo Fleet Iron Co., Ld." The paragraph adds this: "It is confidently expected that by bringing the assets and properties of the two companies under unified control the earning power of the combined companies will be greatly improved." That was not, I think, seriously challenged before me, and I believe it to be true.

There was an order of the Court directing meetings to be summoned, and proxy forms, as I have already said, were settled, and a circular was sent out under date July 3, 1933, by the directors. This circular has been the subject of serious criticism by counsel for opposing debenture holders. I may say here that the resolution as put before the holders of the debenture stock was one which, if passed at all, was passed by a very narrow majority. The other classes concerned carried the resolutions put before them by very large majorities. There has been no opposition on their behalf, although I have received a number of letters from holders of these classes as to which I would say I have carefully considered what they have urged. I am, however, perfectly convinced that, so far as the shareholders are concerned, the resolutions were not only carried with the requisite majorities, but that the schemes, so far as they were concerned, were beyond all doubt such as reasonable members of the class would approve.

The position with regard to the whole of the 5½ per cent. first mortgage debenture stock is, however, a very difficult one, and it requires a good deal of consideration. Not less than 1095 holders of that stock admittedly voted in person or by proxy against the scheme, and an additional holding of 24,520*l.* would have defeated that particular resolution. It is said that if proper proxies had been admitted the resolution, so far as the debenture stockholders were concerned, would have been defeated. It is evident that the voting on this particular resolution was very close and, for that and the other reasons I have mentioned, I think it is necessary for the Court very carefully to consider and examine the scheme. The nature of the sacrifices which the debenture stockholders are asked to consent to is, I think, fairly stated at the bottom of page 3 and half way through page 4 of the circular, and I shall regard myself as having read those paragraphs, beginning with the words "The Debenture Stockholders are asked to agree . . . ." I should add that they are asked to agree to the surrender and cancellation of ten shillings out of each 1*l.* nominal amount of stock held by them, and to accept in respect of that thirty 6 per cent. preference shares of 1*l.* each and thirty preferred ordinary shares of 1*l.* each in the capital of the company, all credited as fully paid. Here I must mention one of the necessities of the case. A large amount of further capital is required for the purpose of the amalgamation and for the purpose of clearing up the difficulties in which Dormans are placed, and for that purpose it is proposed to create 2,500,000*l.* worth of prior lien stock charged on the assets to be acquired as the result of the amalgamation and to issue the greater part of the stock, I think 2,250,000*l.* of it, at once. The arrears of interest due on the debenture stock are to be cancelled: they are to waive their right to repayment on May 1, 1963, and they approve of the cancellation of the sinking fund obligation and the creation of a new fund to redeem the stock in 37 years. Further than that, it is to be observed that there is being issued to the shareholders in South Durham 5½ per cent. debenture stock so surrendered by the present

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holders, but the stock so surrendered is to be called "A" first mortgage debenture stock, and it is to be a fixed interest-bearing stock. On the other hand the stock not surrendered is to be called "B" first redeemable stock: on that the interest is to be non-cumulative and payable only out of profits to be ascertained as provided by the scheme, and if the interest is paid at the full rate at the end of three consecutive financial years the interest is to cease to be dependent on the profits. After that the stock is to rank pari passu as regards interest and the repayment out of the surplus assets.

I have anxiously considered the terms of the circular and have weighed the arguments which have been presented to me. In my opinion the circular was not sufficient in the particular circumstances of this case, and it was in one important respect misleading. The most serious matter, in my opinion, is the reference on page 4 to the trustees for the stockholders. It is in these terms. "The terms of the scheme have been referred to the trustees for the stockholders who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders." The truth of the matter is that there were four banks who had been financing the company, Barclays Bank Ld., the National Provincial Bank Ld., the Midland Bank Ld., and Williams Deacons Bank Ld. Of those, Barclays Bank Ld., were the trustees. They were owed a week ago a sum of about 1,411,000*l.*, and as a result of a provisional agreement entered into by the company, partly referred to and explained in the circular under the heading of "Bankers," they are beyond all doubt getting great advantages if the scheme goes through. In my opinion it was quite wrong to say that the scheme had been referred to the trustees for the stockholders who, after making a careful investigation, "recommend the proposals for the approval of the stockholders," without telling them, or reminding them if they already knew, that Barclays Bank Ld. were the trustees and that they had the strongest interest in recommending the scheme from their own point of view as bankers. This Court has known and has referred for hundreds of years to the difficult position of trustees who have an interest that conflicts with their duty. It is idle, I think, to suggest that it is possible for a bank which is owed about one and a half million pounds, only part of it secured, to act impartially in considering such a scheme as that which is now proposed: yet, in my opinion, the ordinary reader of the clause which I have read would necessarily draw the inference that the independent trustees had, after a careful investigation of the whole position, come to the conclusion that the reader should vote for it, and that it might properly be approved or ought to be approved by the stockholders. It is true, that there is a clause in the trust deed, clause 46, which permits Barclays Bank Ld. to act as bankers for the company, and to make advances, and do other things, in that capacity. I must express the opinion which I have already expressed during the argument that that is a most undesirable clause. It is one which I myself would never have approved, nor, I believe, would the stockholders if they had been told it was to be inserted or had any idea as to how it might operate. This question as to the duties of trustees is not a technical matter at all. The greater the complexity of a proposed scheme under which shareholders or debenture stockholders are asked to make sacrifices, the more necessary it is for them to have the assistance of independent trustees and the more useful such advice is likely to be. There is another great case which, I think, has not finally left our Courts, in which a sum of 10,000,000*l.* or so has been lost, and I know well that the views of the trustees in that case have been of great assistance in enabling the Court to make certain orders which it was asked to make. I think it is most unfortunate that in the present case it has been impossible for the debenture stockholders to have the opinion of a really independent trustee to guide them in the matter which is before them.

That is not, however, the only matter in which I think the circular, from the point of view of the debenture holders, is open to serious criticism. In my opinion, it was not right, in asking the debenture holders to give up so large a portion of their security, to omit from the circulars a statement of the results of the new valuation which, on page 2 of the circular, it is stated has been made on the basis of the earning power of the company, the statement being that "the revaluation has been confirmed by the well-known valuer, Mr. P. Michael Faraday, and by Mr. John E. James, the chairman of the Lancashire Steel Corporation, Ld." In my opinion, the valuation having been made, the amount of it should have been stated. No figures whatever are given. It is quite true that the valuation by itself, being a valuation of the assets of the company as a going concern, is one which ought not to suggest that that sum is realizable on a forced sale of the assets. I think the circular might well, after having given the figure, have stated reasons for thinking it could not be properly relied upon in the event of a liquidation, but it is a matter on which, in my opinion, the debenture holders were entitled to be informed.

There is one other matter and that is with reference to the position of the banks. Something is said as to the position of the banks on page 4 of the circular. In my opinion the two paragraphs where the position of the banks is explained are not wholly satisfactory, inasmuch as I think it is impossible for a reader to judge how far the scheme is for the benefit of the four banks and what sacrifices they are making in accepting 290,000 preference and preferred ordinary shares without a statement of the total amount due to them. 290,000*l.* is a large sum, but it is small compared with 2,420,000*l.* Nor, I think, can a reader tell how far the position of the banks is being altered to the advantage of the company when he is told that 1,650,000*l.* is to remain as a sort of outstanding balance of indebtedness at a rate of interest which is not to exceed four per cent., unless the reader is also told that there will remain some 700,000*l.* or so, which can be called in at once if the banks think fit to do so. In saying that I do not wish to suggest in the very faintest way that these banks are likely to use their powers to bring down the amalgamated company: anybody who knows anything about business concerns will be quite convinced to the contrary;

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nor do I want to suggest that the bankers have driven a hard bargain or have done anything unfair, even if such a matter were within my knowledge. Banks are commercial enterprises and they are entitled to do the best they can for the benefit of their own shareholders in negotiating a scheme such as was presented to them by Dormans. In this connection I have to deal with the claim, put forward by counsel for opposing debenture holders, that this scheme is a scheme for the benefit of Barclays Bank Ld. What that precisely means I do not know. It may mean that the interests of the stockholders have been disregarded, but I think that is probably higher than it could be put. It may mean that the banks have been unduly favoured in regard to the advantages and disadvantages which the various persons concerned suffer under the scheme. It does not seem to me that if that is the point of view it is a matter which can possibly be weighed in the judicial scale. I am satisfied to say that, so far as the advantages obtained by the banks are concerned, in my opinion those advantages are not such that an ordinary business man would not come to the conclusion that they did not in any way prevent him from approving the scheme.

The conclusion to which I have come with regard to the Dormans' petition is that I cannot confirm the scheme for the reasons which I have given as to the circular, even if it were made out (and I am not clear that it has been made out) that the requisite majority was obtained at the meeting to which the debenture stockholders were summoned. Having listened with the greatest care to all the criticisms made against the scheme, I have come to the conclusion that there is nothing in it which, if carefully explained, might not be approved by a business man acting reasonably in the matter. It is, however, for the stockholders to consider whether they will or will not approve it. They must face the position, I think, that the alternative to this or some other scheme is the appointment of a receiver. Persons, some of whom, at least, will be commercial men, will have to consider whether there is any chance of a receiver carrying it on successfully, regard being had to the enormous complication of the interests involved and to the exceedingly difficult commercial times in which we live.

I have now to consider the question whether the petition ought to be dismissed or whether fresh meetings should be summoned. I have criticized the circular in plain language. On the other hand I think I should say that, apart from that, I am perfectly satisfied that the scheme was put forward in good faith and, as evidence of the good faith of the board I would refer to the fact that the board hold very large holdings in debenture stock and shares amounting in nominal value to over 250,000*l*. Secondly, I attribute great weight to the circumstance that a number of persons representative of the insurance companies and investment trust companies, substantial holders of the 5½ per cent. debenture stock, have considered the scheme. Here there is what I hope is only a verbal criticism on the circular. The passage on page 3, somewhat curiously, abstains from saying that they recommend the scheme to the stockholders. All it says in words is that, after they had considered it, they thought the only alternative was the appointment of a receiver. That phrase might be true, even if they objected very strongly to the scheme. But I hope I am right in taking the view that it is an accidental omission and that these gentlemen who, as I have said, represent very large holdings, after prolonged discussion with the board have come to the conclusion that the scheme is one which should be supported. I may add that the investment trust companies hold over 300,000*l*. worth of 5½ per cent. debenture stock and the insurance companies hold 460,000*l*. worth of like stock. That makes altogether a very large holding.

A third matter might be added. There are some smaller objections to the scheme which I have pointed out in the course of the prolonged hearing of this case. They seem to me objections which might well weigh with a stockholder and I understand that all of them can be, and some of them will be, met by a modification. If that is so the new circular, if there is such a circular, sent out to the stockholders might well indicate that the modifications which have been discussed would be put forward and assented to on behalf of the board.

Finally, I think I ought to bear in mind the fact that amalgamation is a course recommended by the national committee to the Government in connection with the granting to the industry of protection against unfair foreign competition. I do not want to attribute too much importance to that consideration, but it seems to me one which the Court is justified in bearing in mind, and which the stockholders themselves might consider if they are in doubt as to which way they should vote.

That, I think, concludes what I have to say in regard to Dormans' petition. I have deliberately refrained from expressing any opinion of my own on the question whether the scheme is one which the stockholders should or should not support, because, in my opinion, that is a matter which is not within the function of the Court. It is for the stockholders, I repeat, to deal with the matter, and if I have taken so long in considering the general features of the case it is because I should be unwilling to let the matter go back for further consideration if the scheme were such that ultimately the Court would have to decline to approve it.

Perhaps I should add that I have no power, as I conceive it, to order a fresh meeting unless I am requested to do so. Nor have I, I think, any power to order a circular to be sent out at all. If I am asked to assent, in the case of Dormans' petition, to a fresh meeting being summoned, I should do so only on some sort of understanding that there was to be another explanatory circular issued to the members of that class.

I now come to deal with South Durham's petition, and I think I can deal with it much more shortly than with Dormans' petition. It is a petition presented by a company, incorporated in 1898, which, up to the present time, has been in a very prosperous condition. The issued capital is 1,237,820*l.*, divided into 6 per cent. cumulative preference shares and 6 per cent. ordinary shares and "B" ordinary shares, all of 1*l.* each. The preference shares are 300,000 in number, the ordinary shares 350,000, and 587,820 "B" ordinary shares have been issued. There are 300,000*l*. worth of 4½ per cent. perpetual debenture stock secured by a first charge repayable in the event of voluntary winding up with a premium of 10 per cent. Each of the two schemes is conditional upon the other scheme being sanctioned, and this one, therefore, takes effect only if Dormans' scheme is sanctioned. I observe that it has to be confirmed by December 31 next, which is an event which may be difficult now and would perhaps necessitate, if the matter goes on, a further resolution.

The facts with reference to this petition are well stated in paras. 13 to 17 inclusive of the petition, which I will treat myself as having read. The first question is whether the scheme has been passed at the meetings of the various classes of shareholders who were concerned. The debenture stockholders, according to the scheme, are to be repaid in cash with a 10 per cent. bonus, and it is not surprising that the opposition there was overcome by the numbers of those voting. There were three other classes—namely, the 300,000 preference shares, the 350,000 ordinary shares, and the 587,820 " B " ordinary shares. The vote was close on all those three resolutions, and, upon the view I have expressed as to proxies, two of the resolutions, at least, were not passed by the requisite majorities, that is to say, the resolution by the holders of the 300,000 preference shares and the resolution by the holders of the 350,000 ordinary shares. The facts with regard to the voting and the proxy forms which the chairman was advised to reject are sufficiently set out in para. 21 of the petition. A number of proxies against the scheme were rejected by the chairman for the reason that, as printed, they expressly directed Mr. Arthur Hyde, the leader of part of the opposition, to vote against the scheme and did not, as did the form settled in Chambers for sending out by the board, leave it to the person giving the proxy to direct whether his proxy should vote for the scheme, with or without modification, or against the scheme. On grounds already indicated I think those proxies were good and ought to have been admitted. They were all lodged within forty-eight hours before the date of the meeting.

I am urged, upon that finding, to dismiss this petition. Having regard to all the circumstances of the case, to the circumstance that the other petition is one on which, as I have said, I am willing to direct other meetings to be summoned, that the interests involved are exceedingly great and widespread, that the joint undertaking is one of vast magnitude, and that many thousands of workmen are employed in the works of the two companies, I do not think it would be right for me to take the easy and simple course of dismissing this petition. The matter has been fully argued, and for the benefit of the various persons concerned I think I should express my opinion, for what it is worth, on the matters which do not go simply to the question of whether the resolutions have met with success or not.

The leading part in the opposition was represented by Mr. Morton, who appears for Mr. Hyde, who sent out a circular asking for proxies against the scheme and giving his reasons against it. I think it is right to express my opinion that Mr. Hyde's circular was a reasonable one, and that its statements are substantially correct and, therefore, very proper to be considered.

There are, I think, two questions to be considered apart from the question as to the resolution, and I have already defined them in dealing with Dormans' scheme. Was the scheme fairly put before the shareholders, being the classes here concerned, and was it such a scheme as reasonable men of business might properly and reasonably approve? I will deal with the second point first. I think there is great weight in the argument, put before me on behalf of the company, that the amalgamation is the result of long negotiation by two wholly independent boards of directors, gentlemen against whom nothing can really be said beyond this, that, under the schemes as they stand, provision is made for their future remuneration and for compensation on liberal terms for those who do not obtain employment as a result of the amalgamation. The directors have testified that, in their opinion, the scheme is a fair one and beneficial to the company. I am content to believe that that is their true view. I think it is perhaps unfortunate that there are provisions for compensation to those members of the board who are not obtaining employment in the amalgamated company on a generous scale, and I should not be sorry to hear that, upon consideration, some modification is going to be made in those provisions. With regard to the remuneration to be given to the directors who are going to be employed in the future it is a true observation that, upon the scheme as it comes before me, some, at any rate, of those directors might be getting something more in future than they have been getting in the past. I am sure that that is not the intention, and, if the matter is further considered, I hope it will be made clear that that is not going to be the case and that, if the scheme goes through, their remuneration is not going to be increased by reason of it. It was suggested by counsel for the leader of the opposition that the directors have suffered a sudden conversion and that they now approve a scheme of amalgamation of which they have previously disapproved. In my opinion, after reading the reports of the chairman's speeches for two or three years past, there is really no foundation for that imputation.

I might leave the matter of the merits of the scheme there ; but I think, having regard to the amount of the evidence given before me, and to all the reports and counter-reports, the valuations and counter-valuations, which I have tried to understand during the last week, I ought to say something in reference to the matters comprised therein. It seems to me that the opponents of the scheme have not fully appreciated the true nature of the report of Messrs. Peat, Marwick, Mitchell & Co., dated August 9, 1932, presented to the directors of the two boards. It is to some extent, I think, the fault of South Durham's board, who have referred to it in their explanatory circular of June 30, 1933, as if the document in question were a valuation of the company's assets. In my view, having carefully considered the matter, I do not think that is a true description of the document unless, indeed, it is explained as being a special kind of valuation prepared with a view only to ascertaining the relative values of the assets of the two amalgamating companies. It has to be admitted, as pointed out in Mr. Morgan's critical examination of Messrs. Peat, Marwick, Mitchell & Co.'s report, that the figures contained in it are largely only of the nature of estimates. I do not want it to be supposed that I accept all the views of Messrs. Peat, Marwick, Mitchell & Co. in this report, and in the subsequent circulars on behalf of the company, or that I reject all the views expressed in Mr. Morgan's report on the other side. The opinion I have formed is this, and I think I ought to express it, in the circumstances of the case. If the matter is approached by debenture holders with a feeling that times are mending, and that the experience of the years 1931 and 1932 is not likely to be repeated or, at any rate, not likely to be repeated for any length of time, the views presented by South Durham's board are easily to be understood, and they are to be understood even if full allowance is made for the circumstance that, as things are, Dormans is in a very serious financial position, and that unless this or some other scheme is adopted there must be a receiver to carry on its great undertaking. Certainly I am not going to take the view that people ought to approach this matter with a jaundiced eye as to the future. Business men, I think, are entitled to take a hopeful view, and they are not going to be persuaded by anything I say that that may be unwise. The other points which have been exhaustively argued before me are all of them points on which I think I may fairly come to the conclusion that the board of the company have acted reasonably and have done the best they can for the interests committed to their charge. Here, again, I think the fact that they have very large interests themselves in the matter is almost conclusive evidence of their good faith.

[His Lordship made some further observations on the form of South Durham's circular, and continued :]

My opinion therefore is that if I am asked to do so I ought to direct fresh meetings to be summoned on the present petition, but in this case I think I should have to direct meetings to be held probably of all the classes concerned. In Dormans' case I think it would be right if I directed only a meeting of the 5½ per cent. debenture stockholders.

[His Lordship, during discussion with counsel, said that he would be willing to consider, on a summons in Chambers, the form of the advertisement of the meetings, the number of days' notice to be given, and the forms of the notices proposed to be sent out and of the proxies proposed to be used at the meetings.]

Solicitors: *Freshfields, Leese & Munns; Gilbert Houghton & Son; Lincoln & Lincoln; Johnson, Weatherall, Sturt & Hardy; Crossman, Block & Co., for Jos. H. Smith & Graham, West Hartlepool; Nicholl, Manisty & Co.*

K. R. A. H.

EGYPTIAN HOUSE PROPERTIES *v.* MAYNARDS, LIMITED.

CLAUSON J.

1934

April 12, 13, 27.

[1933. E. 892.]

Revenue—Income Tax—Sch. A—Lease and Underlease—Incidence of—Repairs Allowance—Right of immediate Landlord of Tenant Occupier to deduct allowance from Rent payable to Superior Landlord—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 35—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. IV., r.* 10; *No. V., r.* 7; *No. VIII., rr.* 4, 11—*Finance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 14).

The repairs allowance authorized by Sch. A of the First Schedule of the Income Tax Act, 1918, No. V., r. 7, to be made for the purposes of collection by reduction of the assessment is not to be deducted from the amount of the rent in order to ascertain the amount from which the person paying the rent can deduct the income tax under r. 4 of No. VIII. of Sch. A of the said Act.

Action.

By a lease dated November 30, 1908, the shop, ground-floor, and basement of No. 418 Strand were demised as from September 29, 1907, for a term of 28 years at the rent of 550*l.* per annum payable by quarterly instalments of 137*l.* 10*s.* The lease contained a covenant by the lessor with the lessees to keep in sufficient repair the external parts of the building of which the demised premises formed part and also a covenant by the lessees with the lessor to keep in substantial repair the interior of the demised premises.

On September 7, 1927, the lease was assigned to the defendants, who, on November 10, 1931, sub-demised the premises to London Jewellers, Ld., for the term granted by the said lease less the last two days thereof at a rent of 800*l.* per annum. The under-lease contained a covenant by the sub-lessees with the defendants, their lessors, to execute internal repairs similar to the covenant in that behalf contained in the lease of November 30, 1908, but did not contain any covenant by the defendants to execute outside repairs.

The annual value of the tenement for the purpose of Sch. A of the First Schedule of the Income Tax Act, 1918, was at the material time 880*l.*, which, less the sum of 150*l.*

allowed for repairs, left the net assessment at 730*l.*, the tax in respect of which at the current rate for the year 1932–33, namely, the sum of 182*l.* 10*s.*, was in February, 1933, duly paid to the Inland Revenue authorities.

The defendants, in whom the reversion of the lease of November 30, 1908, was then vested, becoming liable to pay to the plaintiffs the quarter's rent of 137*l.* 10*s.* due on Lady Day, 1933, claimed to deduct from that sum 5*s.* in the pound on the annual rent of 550*l.*, namely, 137*l.* 10*s.*, without first deducting from the rent of 550*l.* the repairs allowance. The plaintiffs claimed that the amount which the defendants were entitled to deduct was 5*s.* in the pound on 550*l.* less 47*l.* 10*s.* (the sum which the parties agreed was the just proportion of the repairs allowance); in other words, 5*s.* in the pound on 502*l.* 10*s.*, which reduced the amount which the defendants claimed to be entitled to deduct to the sum of 125*l.* 12*s.* 6*d.* Accordingly, the plaintiffs brought this action to recover from the defendants the difference between the quarter's rent of 137*l.* 10*s.* and 125*l.* 12*s.* 6*d.*—namely, the sum of 11*l.* 17*s.* 6*d.*

Raymond W. Needham K.C. and *H. A. Hill* for the plaintiffs. Upon the proper construction of Sch. A, No. VIII., r. 4, the defendants, who, as owners or landlords, have been charged to tax under that Schedule, are entitled in respect of the rent of 550*l.* payable by them to the plaintiffs as the superior landlords to deduct and retain thereout only so much of the tax as represents 5*s.* in the pound for every 20*s.* of the annual rent, after having first deducted from the annual rent " the just proportion of any sums allowed by the Commissioners." To ascertain of what those allowances consist, it is necessary to refer to No. V. in the same Schedule. The expression " all sums allowed by the Commissioners " relates to the allowances (including the repairs allowance) provided for in rr. 1 and 7 of No. V. In the absence of language expressly excluding the repairs allowance the expression " all sums allowed by the Commissioners " would seem necessarily to include repairs allowance. The effect of the words " for the purpose of collection" in r. 7 (*b*) of No. V. was not to convert that which was a sum allowed by the Commissioners into a sum which was not allowed by the Commissioners. In the Income Tax Act, 1918, the word "assessment" is used in different senses: see per Lord Wrenbury in *Kensington Income Tax Commissioners* v. *Aramayo*. (1) In Sch. A itself the expressions "assessment" and "annual value" are confused the one with the other: in the administration of the Act an expression not contained in the Act, namely, "net assessment" had come to be used for the sake of showing clearly the amount upon which the tax was actually charged; and the draftsman in 1894 may well have adopted the phrase "for the purposes of collection" in order to avoid the expression in the language of the earlier enactments and to make it plain that the deduction did not affect the "annual value," but did reduce the amount of the assessment upon which the tax was to be charged. On no view of the matter could the words "for the purposes of collection" be read literally, seeing that for the fundamental purpose of computing the taxpayer's total income, it was admittedly the assessment as reduced by the repairs allowance which had to be brought in. This view, which it is submitted is the correct one, is supported by the earlier legislation—namely, the Income Tax Acts of 1803 (43 Geo. 3, c. 122) and 1805 (45 Geo. 3, c. 49). The Act of 1803 says in terms that the person paying the rent must deduct therefrom the amount of the repairs allowance and may deduct tax from the balance. In the Income Tax Act of 1806 (46 Geo. 3, c. 65) the sums allowed by the Commissioners are spoken of compendiously in the phrase "all sums allowed by the Commissioners being first deducted" which is the same phrase as that which has now to be construed. The circumstance that the repairs allowance was dropped in 1806 and was not reintroduced until 1894 does not affect the principle involved. What happened in 1894 was that the repairs allowance re-entered the class of deductions first specified in the Act of 1803 and compendiously described in the Act of

(1) [1916] 1 A. C. 215, 225.

1806 and became again one of "the sums allowed by the Commissioners." The consolidating Act of 1918 accepted the same classification as was made in 1803 and used the same words as were introduced in 1806. The whole object of rr. 1 and 4 of No. VIII is to ensure that the tenant occupier passes on to the landlord the amount of tax appropriate to the landlord's income and no more than that. As to r. 11 of No. VIII., that rule relates to a person entitled to a ground rent; the word "ground rent" means different things in different contexts: in this context a person entitled to a ground rent is distinguished from a person entitled to a rent within r. 4: r. 11 was enacted ex majori cautela to make it plain that, as between persons who had no concern with repairs, the right to deduct tax was not affected by the repairs allowance: the provision was made to safeguard such persons as mortgagees, annuitants, and ground landlords in the narrow sense. Rule 11 applies only to certain persons embraced by r. 4: it does not and does not purport to apply to persons within the ambit of r. 1—namely, tenant occupiers and their landlords; and if r. 11 were given a wider meaning than the one attributed to it, the provision would make a complete distinction according to whether the person paying the rent was a tenant occupier or an intermediate tenant, and there is no ground for such a distinction.

A. M. Latter K.C. and *Cyril King* for the defendants. Upon the proper construction of No. VIII., rr. 1 and 4, the deductions allowed by the Commissioners are to be made not from the rent which the defendants have to pay to the plaintiffs, the superior landlords, but are intended to be in relief of the tax, that is to say, in ascertaining the annual value of the tenement for the purpose of assessing the tax chargeable upon it, the deductions allowed by the Commissioners are to be made from the rent. Alternatively, the point is expressly covered by r. 11 of No. VIII., and the defendants are right on this ground also. The reduction for purposes of collection on account of repairs in r. 7 of No. V. is not there called an allowance, as are the items mentioned in r. 1 (*e*), (*f*), and (*g*). Assuming the Commissioners were

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authorized by the rules to allow the deduction of 150*l.* in respect of repairs, the deduction of that sum or the just proportion of it agreed to by the parties concerned is not liable to subtraction from the rent the defendants are liable to pay to the plaintiffs before the tax is assessed on the resultant amount of the rent. The history of the legislation shows that this is so. Although under 43 Geo. 3, c. 122, and 45 Geo. 3, c. 49, there was a right to deduct from the rent a sum in respect of repairs, that was not the case under 46 Geo. 3, c. 65, in which the words in parenthesis first occur: see s. 74 and Sch. A, No. IV., rr. 9 and 10, and No. V., rr. 4 and 5. The absence from that Act of the right to deduct from the rent given by the earlier Acts is significant: further, there is no repairs allowance specifically mentioned in that Act or in the Income Tax Act, 1842, though there is an allowance for land tax and drainage tax, which were allowances under the three Acts of George III.

Under the Income Tax Act, 1842, s. 60, Sch. A, No. IV., r. 10, the defendants would have been entitled to deduct from the rent payable to the plaintiffs the full tax without making any deductions therefrom. The right given to the defendants by the Act of 1842 is preserved by No. VIII., r. 4, of Sch. A of the Act of 1918.

By the Finance Act, 1894, s. 35 (*b*), the amount of the assessment is, for the purpose of collection, to be reduced by the sum allowed for repairs, and that provision is now represented by r. 7 of No. V. of Sch. A of the Act of 1918. This reduction is quite different from the allowance for repairs under the two earlier Acts of George III. The phrase "reduced for purposes of collection" is designed to effect a reduction in the amount of tax to be paid to the revenue for the particular property: it is used for no other purpose. It is submitted that, when the phrase was first introduced by the Act of 1894, the Legislature was not intending to alter the position as it stood at the date of the Act 46 Geo. 3, c. 65. And when the Act of 1894 is read with the Income Tax Act, 1853, s. 40, the intention was that relief for repairs was not to have any bearing on the tenant's right of deduction of tax from rent: the Act of 1853 for the first time prevented the tenant from deducting more tax than he had paid. By allowing the full one-sixth when the landlord did the repairs, but not when the tenant did them, it was intended to give relief on the landlord's real income. If the assessment was reduced below the rent, the tenant's right of deduction was limited to the tax he paid: when the landlord did not suffer because the tenant did the repairs, the relief was restricted to tax on the amount of the rent. The defendants are in the position of "an owner" within the meaning of r. 11 of No. VIII.: the term "owner" there need not be read in a strict technical sense and includes the defendants as tenants under the head lease: *Lister* v. *Lobley*. (1) The defendants' right of deducting the tax from the rent payable to the superior landlords is not to be affected by the relief afforded to the tenant occupier by r. 7 of No. V.: r. 11, No. VIII.

April 29. CLAUSON J. In this action I have to determine a question as to the incidence of Sch. A income tax between on the one hand the defendants, who are owners of an underleasehold interest in No. 418 Strand, and as such the immediate landlords of the tenant occupier, and on the other hand the plaintiffs, who hold the superior interest (it is in fact, I was told, a leasehold interest, but it is not suggested that the circumstance is material) out of which the defendants' under-leasehold interest is carved. The rent which the defendants pay to the plaintiffs is 550*l*. per annum. I was not told what rent the tenant occupier pays to the defendants, but I understood it to be substantially in excess of the rent which the defendants pay to the plaintiffs. The annual value of the premises for Sch. A purposes, apart from the matter of repairs allowance, is 880*l*. The repairs allowance is 150*l*. The Sch. A tax actually paid to the revenue for the relevant year 1932–3 was 182*l*. 10*s*., being 5*s*. in the pound on 730*l*. (videlicet 880*l*. (the annual value) less 150*l*. the repairs allowance). For some reason which it was not considered relevant to communicate to me the actual sum, namely, 182*l.* 10*s.*, being 5*s.* in the pound on 730*l.*, which was paid to the revenue, was provided by the defendants (the landlords of the tenant occupier); but it was agreed before me by counsel that, for the purposes of the present case, the rights of the parties were just the same as if the normal course had been pursued, that is, as if the tenant occupier had paid the 182*l.* 10*s.* to the revenue, and had deducted it from the rent which he paid to the defendants.

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(1) (1836) 2 Har. & W. 12.

The Sch. A tax, 182*l.* 10*s.*, having been paid to the revenue in February, 1933, the defendants, on becoming liable to pay to the plaintiffs the rent, videlicet 137*l.* 10*s.*, due from them on March 25, 1933, claimed to deduct from that sum 137*l.* 10*s.*, videlicet 5*s.* in the pound on the 550*l.* annual rent reserved to the plaintiffs by the under-lease held by the defendants. It was not disputed that this claim would have been correct but for the existence of the repairs allowance of 150*l.*

The defendants maintain that the existence of the repairs allowance is a matter which merely affects (*a*) the amount which the revenue can claim to collect from the tenant occupier and (*b*) the amount for which the tenant occupier can claim recoupment from the defendants, his immediate landlord, and that it leaves the annual value and accordingly the tax calculated by reference to the annual value unaffected, with the result that the defendants remain entitled to deduct from the rent paid by them to the plaintiffs 5*s.* in the pound on the annual rent reserved by the under-lease, but so that the total sum deducted is not to exceed the amount of tax in fact borne by the plaintiffs, which was 182*l.* 10*s.*

The plaintiffs, on the other hand, maintain that upon the true construction of the statutory provisions relating to the repairs allowance the sum which the defendants are entitled to deduct from the rent payable to the plaintiffs is limited to 5*s.* in the pound on a sum less than the rent payable by the defendants to the plaintiffs by a "just proportion" of the repairs allowance, to be determined, in case of difference, by the Commissioners for General Purposes under the All

Schedules rule 22 in the Act of 1918 which reproduces s. 160 of the Act of 1842.

In order to simplify the issues in the present case the parties appear to have agreed to consider 47*l.* 10*s.* as the sum which would be determined by the General Commissioners as the "just proportion of the repairs allowance," the benefit of which should be given to the plaintiffs, if any such benefit is so to be given. The plaintiffs accordingly claim that the amount to be deducted for tax by the defendants is not 5*s.* in the pound on 550*l.* but 5*s.* in the pound on 550*l.* less 47*l.* 10*s.*, i.e., on 502*l.* 10*s.* The latter sum is 125*l.* 12*s.* 6*d.*; and in this action the plaintiffs claim the difference between the quarter's rent of 137*l.* 10*s.* and this sum of 125*l.* 12*s.* 6*d.*, videlicet 11*l.* 17*s.* 6*d.* as rent unpaid.

In the early income tax legislation in and after 1803 there was under certain circumstances an allowance made of the nature of a repairs allowance, and my attention was drawn to certain provisions in the pre-1842 Income Tax Acts relating to that allowance. I do not propose to refer to those earlier Acts, as such a reference seems to me to obscure rather than clarify the point with which I have to deal. The question appears to me to turn on certain provisions in the Income Tax Act, 1918, as amended by later Acts. As, however, the Act of 1918 prima facie appears to be, so far as the matter now in hand is concerned, a mere rearrangement of the relevant sections as they stood before 1918, it is, I think, desirable that I should first consider the sections in the Finance Act, 1894, which introduced the repairs allowance in its modern form, and ascertain what operation those sections would have had, if the present case had arisen before 1918.

Until the Finance Act, 1894, came into operation, there can be no question but that the defendants, on the facts of the present case, would have been entitled to deduct from the rent payable to the plaintiffs the full tax at the current rate on the rent of 550*l.* They would have been so entitled under the Income Tax Act, 1842, s. 60, Sch. A, No. IV., r. 10, they being "the landlord owner or proprietor by whom a deduction (scilicet that made by the tenant occupier out of his rent) shall have been allowed," the rent of 550*l.* being "a rent or annual payment reserved or charged" upon the premises in question, and the plaintiffs as the persons "entitled unto such "rents would have had to allow the deduction. As I read the rule (and there is not, I think, any dispute as to this) the amount which the defendants may deduct must be either a part or the whole of the "duty paid"; and accordingly, while the deduction is prima facie to be a sum calculated at the current rate of tax on the rent payable to the plaintiffs, it must not exceed the actual figure chargeable for Sch. A tax against (in the first instance) the occupier. The words "the just proportion of the sums allowed by the Commissioners in the cases authorised by this Act being first deducted" seem to refer to the various deductions and allowances to be made under Sch. A, No. V. and No. VI., and to be aimed at insuring that in no case shall the deduction exceed the tax paid on the annual value as ultimately adjusted after bringing into account the deductions and allowances under Sch. A, No. V. and No. VI. It is to be observed that in Sch. A, No. IV., r. 9, which regulates the process of deduction, as between the occupier and his landlord, the corresponding phrase is "all sums allowed by the Commissioners being first deducted." I have to confess that, even with the assistance of the very experienced counsel before me, I do not appreciate the reason for the difference in phrase. But whatever the exact meaning of the phrase "just proportion" may be, no one seems to question that in the case I have put in this paragraph the deduction would have been as I have stated it.

The repairs allowance more or less as it now exists was instituted by s. 35 of the Finance Act, 1894, and I proceed next to consider how far the mutual rights as between persons in the position of the defendants and the plaintiffs would have been thereby affected. For convenience I assume all the facts to be as in the present case, except that the question arises in regard to a year after 1894 in which s. 35 is applicable. The effect of the section seems to be that, in the case of the premises now in question, the amount of the assessment is for purposes of collection to be reduced by a sum which is usually called and can conveniently be spoken of as the repairs allowance, but (clause (*c*)) that as between the owner (i.e., as I read it in the present case the defendants) and the plaintiffs, as persons entitled to an annual sum payable out of the property, the defendants' right of deduction under the Income Tax Acts in respect of income tax is to be in no wise prejudiced or affected by the relief afforded by this section. It seems fairly clear that the repairs allowance is to go to reduce the sum actually collected from the sitting tenant. It seems also fairly clear from s. 35 (*c*) that the existence of the repairs allowance is not to interfere with the right of the defendants as " landlord owner or proprietor " (I use the language of Sch. A, No. IV., r. 10) to deduct from their superior landlord, the plaintiffs, exactly the same sum as they could have deducted if no provision for repairs allowance existed. What seems to me to be left in some obscurity (but it is not the point with which I am concerned in this case) is whether the sum to which " for the purposes of collection " the tax chargeable against the tenant occupier is reduced is the maximum sum which the tenant occupier can retain against his landlord ; but on a consideration of clauses (*b*) (i.) and (*b*) (ii.) it would seem that the tenant cannot deduct as against his landlord more than the figure which he has in fact paid for tax. It may be that, apart from this section, this result would follow by reason of the last six lines of s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34). In other words the repairs allowance relieves the tenant occupier and relieves his landlord, but the benefit of it is not passed on to any person who is either a mortgagee or a superior landlord of the landlord ; such a person is left quite unaffected, as regards the deduction he has to suffer, by the repairs allowance.

The Income Tax Act of 1918 recast these various provisions, but I cannot find that the position of the various parties, in such a case as the present, can be treated as altered by reason of this recasting. The relief given, as regards repairs allowance, to the tenant occupier and his landlord by s. 35 (*b*) of the Act of 1894 is reproduced by Sch. A, No. V., r. 7, in the Act of 1918. The provisions of s. 40 of the Act of 1853, so far as I have referred to them above, are reproduced by Sch. A, No. VIII., r. 1, second proviso, and r. 4 (i.), second proviso. The right of deduction as between the landlord and his superior landlord which was given by Sch. A, No. IV., r. 10, of the 1842 Act is reproduced in Sch. A, No. VIII., r. 4, with, so far as I am able to detect, no material alteration. The preservation as between the landlord and his superior landlord of the right of deduction as unaffected by reason of the repairs allowance which was, as it seems to me, secured by s. 35 (*c*) of the Act of 1894, is reproduced with, so far as I am able to detect, no material alteration in Sch. A, No. VIII., r. 11. Since 1918 the Finance Act, 1923, has modified the amount of the repairs allowance in terms which have the effect (inter alia) of making it clearer than before that the repairs allowance is to operate for the benefit (as I have indicated above) of both the tenant occupier and his immediate landlord, but the alterations do not seem otherwise to have affected the matter.

So far there seems to be no reason for holding that the existence of the repairs allowance should be taken in account at all as between the defendants and the plaintiffs.

The argument presented to me on behalf of the plaintiffs to justify the contention which they put forward, was, as I understood it, as follows: It was said that by Sch. A, No. VIII., r. 4, the defendants are entitled on making a payment of rent to the plaintiffs to deduct and retain "thereout," scilicet, out of the payment, so much of the Sch. A tax as represents 5*s*. in the pound for every 20*s*. "thereof" (i.e., of the annual rent), the just proportion of any sums allowed by the Commissioners being first deducted (scilicet from the amount of the annual rent).

I feel a great difficulty in construing the rule thus. I should have thought that the "just proportion of any sums allowed" was to be deducted not from the rent but from the tax, and that the object of the words "(the just proportion of any sums allowed by the Commissioners being first deducted)" was to ensure that as between the deducting party and the party suffering deduction, the tax, part or the whole of which may be deducted up to 5*s*. in the pound on the rent, should be the tax calculated on the annual value as diminished by the various allowances made under the Act.

If my view is right, then (apart from the express provision of Sch. A, No. VIII., r. 11) the repairs allowance would be taken into account in calculating the tax, and the rights of deduction (taking the figures in the present case) would work out as follows: The Sch. A tax would be taken as 5*s*. in the pound on 880*l*. less 150*l*., i.e., on 730*l*. (treating the whole allowance as the "just proportion"), and would thus be 182*l*. 10*s*. The defendants would be entitled to deduct from the plaintiffs 5*s*. in the pound on the rent payable to the plaintiffs, provided that sum does not exceed (as of course it obviously does not exceed) 5*s*. in the pound on 730*l*.; and it would follow that in the present case the defendants would (apart from Sch. A, No. VIII., r. 11) succeed in this action, the fact being that the improved value exceeds the rent payable to the plaintiffs by a sum in excess of the repairs allowance and accordingly, on the particular figures in this case, the amount of the repairs allowance becomes in any view of the matter immaterial. If my view of the construction of the rule is correct the repairs allowance (even apart from the point on Sch. A, No. VIII., r. 11) will never affect the deduction as between the landlord and the superior landlord, unless it (or rather the "just proportion of it") is such a figure as will, if deducted from the assessed annual value, reduce the assessed annual value to a figure below the annual rent payable by the landlord to his superior landlord.

I must once again, however, emphasize that in what I have said above I have disregarded the point on Sch. A, No. VIII., r. 11. The question whether the plaintiffs' construction of r. 4 is correct or whether my construction of r. 4 is correct does not arise if r. 11 has the meaning which it appears to me to have. Rule 11 appears to me to state in effect that the repairs allowance is to be disregarded in any question as between the owner (i.e., the defendants) and the superior landlord (i.e., the plaintiffs); and, if so, the question on r. 4 does not arise. It was argued that "owner" in r. 11 did not include the immediate landlord of the tenant occupier. As to that I can only say that I do not see why it should not. The rule seems clearly to contemplate that a person who has to pay a ground rent, who must of course be a leaseholder, is an owner, though there is a superior landlord, videlicet the freeholder, to whom the ground rent is payable; and, if so, I do not see why an under-leaseholder should not be described as an owner notwithstanding that there is a superior landlord, videlicet the superior leaseholder, to whom he has to pay a rent.

It is to be observed that on the construction which I give to the various relevant provisions the expression "for purposes of collection" becomes intelligible; it means that while the tax payable under Sch. A is and remains a larger figure, the actual tax to be collected from the tenant occupier and accordingly to be deducted by him from his immediate landlord is to be the lesser figure, videlicet, the Sch. A tax diminished by the repairs allowance. I understood counsel for the plaintiffs to be unable to suggest any meaning for the phrase except the meaning "for purposes of taxation generally," a meaning which does not appeal to me as probable or even possible.

From the view that I take of the meaning of Sch. A, No. VIII., r. 11, it necessarily follows that the defendants are right and the plaintiffs wrong in their respective contentions, and that the action must be dismissed.

Solicitors: *William Easton & Sons; Simon, Haynes, Barlas & Ireland.*

H. C. H.

CLAUSON J.

1934

June 20, 21, 29.

COULSDON AND PURLEY URBAN DISTRICT COUNCIL *v.* SURREY COUNTY COUNCIL.

[1933. C. 4116.]

Local Government—County Council—Rating Authorities—Valuation of Special Classes of Property—County Valuation Committee—Duties of—Promotion of Uniformity in Valuation—Advice and assistance to Rating Authorities—Power to appoint Panel of Valuers for Special Properties—Usurpation of functions of Rating Authorities—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *ss.* 18, 38, 53, 55.

In the course of preparing a new valuation list under the Rating and Valuation Act, 1925, a conference was held between the county valuation committee (a committee of the Surrey County Council) and representatives of the rating authorities in that county, including the plaintiff council, at which it was resolved that uniformity in the assessment of properties of a special character would be best secured if one valuer were appointed to value each class of property throughout the county, and that the best means of attaining that end would be by co-operation between the county valuation committee and the rating authorities in the exercise of their respective powers under the Act and the appointment by the county valuation committee of a county panel of valuers to value special properties on behalf of the rating authorities and themselves, the valuers appointed, if possible, to be valuers who had previously acted for rating authorities in the county, and further, that, having regard to the interest of each rating authority in the attainment of uniformity not only in its own area but also as between its own area and all other areas in the county, the payment of the valuers employed on the panel should be met by the county valuation committee as a county charge.

Accordingly, the defendants, in professed exercise of their powers under the said Act (see ss. 18, 38, 55), appointed a panel of valuers to value the special properties throughout the county with the view to advising the county valuation committee and any rating authorities desirous of availing themselves of their advice and assistance in connection with such valuation, and in due course delivered a precept to the plaintiffs for their share of the county rate, which included the fees and expenses connected with the panel of valuers.

In consequence of such action the plaintiffs challenged the power of the defendants to appoint a panel of valuers to value special properties on behalf of the plaintiffs, a mode of procedure which they alleged had the effect of throwing upon the county rate the whole of those fees and expenses and to spread the burden over the whole county, including the plaintiffs' area, which contained relatively few of the special properties, to the relief of areas which contained a larger number of special properties; and by this action they claimed a declaration that the defendants had no power under the said Act or otherwise to appoint or maintain a county panel of valuers to value special properties on behalf of rating authorities or to charge fees or other payments to such valuers or the expenses of establishing and maintaining the panel against the county rate :—

Held, that the appointments by the defendants of valuers to value special properties throughout the county were not in fact made by the defendants on behalf of the plaintiffs, and further, that the action of the defendants in making the appointments and charging the fees and expenses in connection therewith against the county rate was no usurpation by the defendants of the plaintiffs' functions under the Act, but was within the scope of the defendants' duties and powers within the meaning and intent of s. 18 and other provisions contained in the said Act.

Query whether, had there been evidence to prove that the action of the defendants was ultra vires, the Court would, in the absence of the Attorney-General, have jurisdiction to grant any relief to the plaintiffs.

WITNESS ACTION.

The following statement of the facts of the case is borrowed from the judgment of Clauson J. :—

The Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), is, as stated in its title, an Act to simplify and amend the law with respect to the making and collection of rates, to promote uniformity in the valuation of property for the purpose of rates, and for other purposes incidental to or connected with the matters aforesaid.

By virtue of s. 1 of the Act the plaintiffs, who are the Coulsdon and Purley Urban District Council, became the rating authority for that urban district, which is a district within the administrative county of Surrey, and from and after April 1, 1927, the plaintiffs, by virtue of the same section, became the sole authority having power to make or levy any rate within that district.

Sect. 2 makes it the plaintiffs' duty to make and levy a consolidated rate to be termed " the general rate," and s. 9 contains machinery for enabling the county council by precept to procure the levying by the urban district council, as part of the general rate, and the payment over to the county council of the amount required to meet the financial requirements of the county council.

Sect. 16 enables assessment areas to be constituted and s. 17 sets up an assessment committee for each such area.

Sect. 18 provides that in every county there shall be a committee of the county council to be called "the county valuation committee," its duties being to take such steps as it may think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under the part of the Act which is headed Valuation; and, for the purpose of the performance of these duties, the committee are to have power to bring to the notice of any rating authorities any conclusions arrived at by the committee, and the county valuation committee may appear as a party to any objection or appeal under the same part of the Act.

Under s. 19 of the Act certain valuation lists are to be made, and the machinery for bringing a valuation list into being is as follows: Under s. 25 the rating authority is to prepare a draft list for their area which they are to transmit to the assessment committee and, under s. 26, objections to the figures in the draft list may be made by aggrieved persons, including the county valuation committee, the county council, and any other local authority. Under s. 27 the assessment committee is to consider the objections so made and is to revise the draft list, whether for the purpose of meeting objections or for any other reason, as they think proper, and under s. 28 the draft list, after final approval by the assessment committee, becomes the valuation list for the rating area.

Sect. 38 authorizes any rating authority and any county valuation committee to employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in their area.

The expenses of a county valuation committee are, by virtue of s. 53, to be defrayed as expenses for general county purposes, and by virtue of s. 55, rating authorities and county valuation committees may appoint such rating officers, valuation officers, and other officers as they think fit and pay them reasonable salaries.

In this state of the law the county valuation committee for Surrey, being a committee of the defendants, the Surrey

County Council, had to consider what steps to take in the course of their duty of promoting uniformity in the principles and practice of valuation and assisting rating authorities in the performance of their functions, in regard to, in particular, the valuation of what have in this action been termed "special properties," that is to say, properties other than ordinary residential or business properties, including such things as water undertakings, race-courses, licensed premises, public utility undertakings, and so forth.

Some experience in the matter appears to have been obtained in the course of the preparation of the first valuation list prepared under the Act of 1925, and in March, 1931, the county council, on behalf of the county valuation committee, wrote a letter to the clerks of the rating authorities within the county, including the plaintiffs, in the following terms: "12th March, 1931. Dear Sir, The Second New Valuation Lists; Valuation of Special Properties. I have to inform you that the county valuation committee have given careful consideration to the procedure to be adopted with regard to the valuation of 'special properties' throughout the county for the purposes of the second new valuation lists. In considering the system most likely to secure the greatest measure of uniformity of assessment the chief classes of 'special properties' to which the committee gave attention included public utility undertakings, local authorities' property, licensed premises, theatres, music-halls, cinemas, race-courses, factories and warehouses, sports grounds and mineral-producing hereditaments. For the purposes of the first new valuation lists, a number of professional valuers were engaged on the valuation of each of these classes of property, the greatest number being employed in connection with licensed premises, namely, fourteen. The county valuation committee are of opinion that the results of that procedure cannot be said to be satisfactory from the most important point of view, namely, uniformity of assessment. The committee feel that, in connection with the second new valuation lists, uniformity in the assessment of each class of special property would be best secured, if one valuer were appointed to value each type of property throughout the county. With this object they propose, if the rating authorities agree, to establish a county panel of professional valuers. Further, having regard to the common interests of the county valuation committee and the rating authorities in securing a fair and equal basis of assessment throughout the county, the committee are of opinion that, with the approval of the county council, the whole cost of the panel should be met by the committee as a county charge. I should be glad if you would kindly bring this letter to the notice of your committee at their next meeting and would inform me if they agree with the proposal that the valuation of special properties throughout the county for the purposes of the second new valuation lists should be carried out by a county panel of professional valuers to be established by the county valuation committee, the cost to be met by the committee as a county charge." The letter was signed by the clerk of the county council.

Following upon that letter conferences were held between the county valuation committee and the representatives of the rating authorities, and at a conference held upon February 2, 1932, the following resolutions were passed: "(*a*) That uniformity in the assessment of special properties would be best secured if one valuer were appointed to value each class of property throughout the county. (Special arrangements might have to be made in connection with public utility undertakings extending into other counties and the county borough of Croydon.) (*b*) That the best means of carrying this proposal into effect would be by co-operation between the county valuation committee and the rating authorities in the exercise of their respective powers under the Acts and the appointment by the county valuation committee of a county panel of valuers to value special properties on behalf of the rating authorities and themselves, the valuers appointed, if possible, to be valuers who have previously acted for rating authorities in the county. (*c*) That having regard to (i.) the fact that the county rate forms the predominant part of the rates levied in the county districts and to the necessity for securing a fair and equal basis of assessment throughout the county for the purposes of that rate and (ii.) the interest of each rating authority in the attainment of uniformity of assessment not only in its own area but also as between its own area and all other areas in the county, the payment of the valuers employed on the county panel should be met by the county valuation committee as a county charge."

On March 23 the plaintiff council wrote to the county council a letter as follows: "23rd March, 1932. Dear Sir, The Second Valuation Lists. Valuation of Special Properties. County Panel of Valuers. Referring to your letter of the 12th ultimo regarding the above mentioned matter, I am instructed to ask if the county council have included in their estimates for the coming year any sum for the payment of valuers. The reason for the enquiry is that my council have, from the beginning, considered that the county council have no power to act in the manner suggested in your communication of the 12th February last, and they have now been advised by eminent counsel that the county council are not empowered to appoint a county panel of valuers to value special properties on behalf of the rating authority and charge the cost thereof to the county rate."

Ultimately on June 24, 1932, the county council wrote to the plaintiff council as follows: "Dear Sir, Second Valuation Lists. Valuation of Special Properties. County Panel of Valuers. I have to inform you that the county valuation committee have given further consideration to the question of the appointment of a county panel of valuers to value special properties in the county on behalf of themselves and the rating authorities for the purposes of the second valuation lists. After obtaining tenders from selected firms of valuers the committee propose, subject to the terms of contracts being agreed, to appoint valuers to value each class of special property. As soon as the contracts are entered into, the names of the valuers appointed will be sent to each authority." That is signed by the clerk of the county council. As a matter of fact, that letter is not quite accurately expressed.

What the county council in fact did was to appoint certain valuers to value certain classes of special properties by a series of agreements, all in substantially the same form, one of which was put in evidence and is an agreement of September 21, 1932, appointing Messrs. Gerald Eve & Co. to value the whole of the water undertakings and race-courses in the county of Surrey under the 1925 Act. The terms of that agreement make it quite clear that the valuers in question were appointed to value the special properties in question with a view to advising the county valuation committee and any rating authority desirous of availing themselves of their advice; and, accordingly, it would be more accurate to state the effect of what the county council did as being that they appointed valuers to value the properties in question on behalf of the county valuation committee and with a view to advising such rating authorities as chose to take advantage of their advice.

In pursuance of the resolution of February 2, 1932, to charge the fees and the expenses in connection with the establishment and maintenance of the panel of valuers against the county rate, the defendants in due course issued and delivered to the plaintiffs a precept for their share of the county rate which included the sum of 9000*l*. for those fees and expenses: and, accordingly, the plaintiffs brought this action in which they challenged the power of the defendants to appoint the panel of valuers to value special properties on behalf of the plaintiffs or to charge the fees and expenses in connection therewith against the county rate and charged the defendants with having acted ultra vires. They claimed that they and not the defendants were the rating authority for their urban district under the provisions of the Act of 1925, for which purposes they employed and out of the rates of their district paid fees to valuers to value properties within their district, including special properties, and that they had made a new valuation list for their district to come into force on April 1, 1934, the whole of the expenses of making which fell to be borne by their district. They alleged further that the effect of the defendants' action was to throw upon the county rate the whole of the said fees and expenses and to spread the burden of them over the whole county, including the plaintiffs' district (which contained relatively few of the special properties), to the relief of areas which contained a larger number of such properties. The defendants denied that they made the appointments of valuers to value special properties on behalf of the plaintiffs or of any other of the rating authorities: they claimed it was their duty to make a rate for the area of the administrative county of Surrey, a rate which under s. 9 of the 1925 Act was to be levied and collected by means of precepts requiring the rating authorities to levy as part of their general rate a rate of such an amount per pound as might be specified in the precepts upon the rateable value of each hereditament in the area of the rating authority concerned.

They alleged that to ensure that, as far as possible, the rateable values of the hereditaments in the valuation list might be ascertained correctly and uniformly, both they, the defendants, and the rating authorities were given powers and duties relating to the preparation of the valuation list; that the plaintiffs had the duty of preparing the draft valuation list for their rating area and of transmitting it to the assessment committee (a committee constituted under s. 17 of the Act and composed of representatives of the defendant council and of the rating authorities), but the assessment committee and not the rating authorities had the duty under ss. 27, 28 to make and sign the final valuation list containing the rateable values of all the hereditaments upon which both the county rate and the general rates were calculated: and in order to assist them in the performance of their respective duties, both the assessment committee and the rating authorities were empowered by s. 38 to employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in their area and by s. 55 to appoint for the purposes of the Act such rating, valuation, and other officers as they thought fit: and by s. 53, sub-s. 2, the expenses so incurred by a county valuation committee under the Act were to be defrayed as expenses for general county purposes out of the county rate, and expenses so incurred by a rating authority under the Act were to be defrayed out of the general rate, and in particular the defendants pleaded s. 18 of the Act, which cast upon the county valuation committee the duty " to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions " under the Act.

Gavin Simonds K.C. and *Wilfrid Hunt* for the plaintiffs. A duty is cast upon the plaintiffs to prepare the draft of the new valuation list and for that purpose to appoint valuers to make valuations of the hereditaments within their district. They may ask the advice and assistance of the valuers whom the defendants have appointed if and when their own valuation is called in question. But here the defendants, putting the cart before the horse, under colour of offering the advice and assistance of their valuers to the plaintiffs and the other rating authorities in the preparation of the new valuation list, have in effect usurped the duties and powers of the plaintiffs as the rating authorities of their district, by appointing valuers on the plaintiffs' behalf who have made premature valuations of the special properties in the county: such action on the defendants' part has put the ratepayers in the plaintiffs' district to additional and unnecessary expense and is ultra vires.

[CLAUSON J. Is it the positive duty of the plaintiffs to appoint their own independent valuers? Their duty is to put the values in the list. Is there any reason why they should not adopt the valuations arrived at by the defendants' valuers? If the defendants have incurred unnecessary expense in appointing a panel of valuers and making their own valuations, is that any concern of the plaintiffs? The defendants do not seem to have forced their valuations upon the plaintiffs.]

The defendants made their valuations long before it became necessary, before the draft valuation lists had been submitted to them by the rating authorities. The defendants' duty is to make their valuations for the purpose of checking the rating authorities' draft valuation lists. The Act of 1925 defines the functions of the several authorities whose duties are to raise and levy a rate. It would amount to a travesty of language to construe the provisions in the Act as imposing upon each of the authorities the duty of each making its own separate valuation. The powers conferred by the Act must be correlated with the duties imposed by it.

J. E. Singleton K.C. and *Trustram Eve* for the defendants. There has been no usurpation by the defendants of the duties or powers of the plaintiffs. One of the features of the Act of 1925 is the provision (1) to ensure uniformity amongst the rating authorities in making their valuations of the properties in their respective areas, a provision which cast a duty upon the county valuation committee of the defendant county council to assist the rating authorities and the assessment committee in their valuations, and with that view the county valuation committee were empowered by the Act to appoint a competent person to give advice or assistance in connection with the valuation of hereditaments within their area (see s. 38) and to appoint valuation and other officers and pay them salaries (see s. 55). The expenses so incurred by a county valuation committee are to be defrayed as expenses for general county purposes (see s. 53, sub-s. 2). The proper performance of their duties by the defendants involved the making of valuations: they (through the assessment committee, constituted under s. 17, sub-ss. 1 and 4) had the duty of checking the draft list for which the plaintiffs were primarily responsible: and theirs was the duty of finally approving and signing the draft list (see s. 28). The plaintiffs were not under any obligation to adopt the defendants' valuations, but they were at liberty to do so if they pleased. The defendants had the power to issue and deliver a precept (see s. 9, sub-ss. 1, 2) requiring the plaintiffs to raise and levy, as part of the general county rate, the amount of the expenses incurred in connection with the appointment of the valuers by the defendants and the valuations made by them. No additional expenses were in fact thrown upon the plaintiffs in consequence of the action of the defendants of which the plaintiffs complain.

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(1) Sect. 18, sub-s. 2: "It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusion arrived at or recommendations made by the committee or at any such conference."

Cur. adv. vult.

June 29. CLAUSON J. [stated the facts and continued:] For some reason or other the plaintiffs do not desire to have the benefit of the valuations thus made at the instance of the county valuation committee. I have not had evidence as to the steps which the plaintiffs have taken in order to ascertain the proper figures to be adopted for the assessment of special properties within their area. I have not been asked to consider, nor is it within my province in this action to consider, whether or not the steps so taken by the plaintiffs are proper and sufficient. It has not been suggested before me that any one has sought to interfere with the plaintiffs in any such steps as they may have thought proper to take.

The main object of the present action appears to be to obtain from this Court a declaration that the defendants, the county council, through the county valuation committee, had and have no power, under the Act or otherwise, to appoint or maintain a county panel of valuers to value special properties on behalf of rating authorities.

In support of the claim for this declaration the plaintiffs allege (and the allegation is, of course, essential, if they are to get the declaration) that the defendants have purported to appoint a county panel of valuers to value special properties on behalf of the rating authorities in the county.

The first point taken by the defendants is that, as a matter of fact, they have done no such thing, and that the plaintiffs have not proved that they have done any such thing. I see no answer to this point. The truth is that the county valuation committee have appointed valuers to value special properties and are offering to place the opinions thus obtained at the service of the rating authorities. The only foundation for any other suggestion is the not very accurate language used by the defendants in their letter of June 24, 1932. There does not seem to be any substance whatever in the suggestion, as it was put by the plaintiffs' counsel, that the county valuation committee have usurped the functions of the plaintiffs or of any other rating authority.

This being my view of the matter on the facts, I need not consider whether, if the county valuation committee had been so foolish as to " purport to appoint " on behalf of another body, such purporting to appoint would have had any operation or would have given rise to any cause of action.

The next claim made by the plaintiffs is a declaration that the defendants have no power to charge fees or other payments to such valuers as they have in fact appointed, as I have explained above, against the county rate.

Now, as to this, there is no evidence whatever that the fact that the county valuation committee are prepared to place the valuations in question at the disposal of the plaintiffs and the other rating authorities has added a single penny to the expense of obtaining the valuations in question. The suggestion really is that the county valuation committee (whose bona fides, of course, is in no way questioned) have gone beyond the proper scope of their functions in obtaining valuations of special properties for themselves. It is suggested that they ought to have waited until the rating authority had put a figure for a special property in the draft list, and that it was premature for them, until that had been done, to inform themselves by a valuation as to what the figure ought to be.

I disagree entirely with this suggestion. The county valuation committee is bound to promote uniformity in the principles and practice of valuation, as well as bound to assist rating authorities and assessment committees in the performance of their functions, and they are bound to take such steps as they think fit for the purpose. Given bona fides (and that is not in dispute), what wiser or more practical course can they take than to get uniform valuations, all over the county, by the same valuer, of any particular type of property in regard to which difficulties as to valuation, and in particular as to uniformity of valuation, are likely to arise? It is not easy to see what better course they can take than that which they have taken. The suggestion (if indeed it was made) that, having taken steps which they think proper (and which prima facie certainly seem to be most proper) for assisting them in discharging their own functions, they are going beyond the scope of their functions because they place the valuations thus obtained at the disposal of the rating authorities, is one which I at least feel quite unable to accept.

The real truth is that, so far from the defendants seeking to usurp the functions of the plaintiffs, it is the plaintiffs who in this action are seeking to control the exercise by the county valuation committee of its own proper functions.

If I had thought (which I do not) that there was any evidence that the defendants, by the county valuation committee, had been acting ultra vires, there would still remain the difficulty that neither was authority produced, nor principle formulated, which would justify me in giving relief in respect of such ultra vires action, in the absence of the Attorney-General. If there had been any evidence at all to lead me to suppose that the county valuation committee had, by any ultra vires action, added to the expenses claimed by the council by precept (there was no such evidence) an interesting question would at once have arisen as to whether or not such a question could be brought before the Court by an action at the suit of the rating authority which under the Act has to comply with the precept. But on the facts of the case the point does not arise.

Counsel for the plaintiffs at the bar withdrew the claim for damages or repayment with interest of amounts overpaid. Thus, again, it becomes unnecessary for me to consider what

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would be the legal basis for such a claim at the suit of the present plaintiffs.

As matters stand, I have no alternative but to dismiss the action, with costs, to be taxed as between solicitor and client.

Solicitors: *Lees & Co., for Ernest C. King, Purley; Wyatt & Co., for Dudley Aukland, Kingston-upon-Thames.*

H. C. H.

In re SANDIFORD.

ITALO-CANADIAN CORPORATION, LIMITED *v.* SANDIFORD.

FARWELL J.

1934

May 11, 15; *June* 22.

[1933. S. 2545.]

Solicitors—Country solicitors and London agent—Agent's account, including sum for counsels' fees, paid by country solicitors—Fees not paid by agent—Death of agent insolvent—Right of country solicitors to prove in bankruptcy in respect of amount paid by them for counsels' fees.

Country solicitors paid their London agent a sum of 671*l.* 19*s.* 1*d.*, the balance of an account due to him. The account included a sum of 399*l.* 19*s.* in respect of counsels' fees. The London agent, who died insolvent, did not in fact pay the fees. The country solicitors issued a summons in the administration action relating to the estate of the deceased, by which they claimed a declaration that they were entitled to recover the sum of 399*l.* 19*s.* from the estate, or in the alternative a declaration that they were entitled to claim against the estate as creditors:—

Held, first, that the country solicitors could not treat that sum as received by them on a trust to pay counsel, and therefore were not entitled to recover it in full from the estate of the deceased, but

Secondly, that they were entitled to prove as creditors for it, less an admitted set-off, as money had and received.

SUMMONS.

The facts are set forth in the judgment of Farwell J.

W. N. Stable for the applicants. The applicants paid their agent the sum of 399*l.* 19*s.* for the express purpose of paying counsels' fees or in the belief that he had already paid them. He therefore held the money in trust for that purpose and the applicants are entitled to recover the amount from the estate. If they are not entitled to recover the full amount, then they must be entitled to claim against the estate as creditors.

Roger Turnbull for the respondent. To succeed in this application the applicants must show that there was a trust and they have failed to do so. When they paid the money to their agent it became part of his estate, and it was to him, not to the applicants, that counsel looked for their fees.

Stable replied.

FARWELL J. This is a summons taken out in an administration action in which the estate of Henry Gilbert Sandiford is being administered. It raises a somewhat curious question and one not wholly free from difficulty.

The late Mr. Sandiford was a solicitor and he carried on business under the name of Calder, Woods & Sandiford in London. The applicants are Wansbroughs, Robinson, Tayler and Taylor, solicitors in Bristol, for whom Mr. Sandiford in his firm name acted as London agent. On November 7, 1932, the applicants sent to Mr. Sandiford a cheque for 671*l.* 19*s.* 1*d.* That sum represented the balance due to Mr. Sandiford upon an account which was sent to them by him, and included in that account as due to Mr. Sandiford was a sum of 399*l.* 19*s.* in respect of counsels' fees. That cheque was received by Mr. Sandiford and was paid into the client's account.

Mr. Sandiford died on November 19, 1933; subsequently there were administration proceedings. The estate proved to be insolvent and an administration order was duly made. This summons is taken out by the applicants claiming to recover from the estate the sum of 399*l.* 19*s.*, which represents the total amount of counsels' fees already mentioned. Alternatively the applicants ask for a declaration that they are entitled to prove against the estate of the late Mr. Sandiford for a sum of 377*l.* 17*s.* 2*d.*, being the sum of 399*l.* 19*s.* less certain sums which admittedly must be set off against that amount. In every case it appeared from the account that the fees to counsel had been paid; in truth and in fact those fees had not been paid.

It is said that the country clients were not misled in the matter because, although the account shows that the fees had been paid they appreciated that it was not necessarily correct in that respect and that the fees might not be paid till the money was received by Mr. Sandiford, but however that may be there can be no doubt but that the account purported to show a balance due to Mr. Sandiford on the footing that the fees had actually been paid. The position therefore is that Mr. Sandiford received this cheque for 671*l.* odd, which was the balance of the total amount including the fees said to be paid to counsel, which, in fact, were never paid by him. The question is: are the country solicitors entitled to recover the actual sum of 399*l.* 19*s.* or must they prove in the bankruptcy for the amount due, or as is suggested by the respondent, is no remedy open to them?

The country solicitors adopted the honourable and commendable course of paying counsel themselves. That, as I have said, was a commendable act on their part, but it cannot affect the position. The fact that they have chosen to pay those fees can give them no better right against the estate of the dead man than they would otherwise have had.

The respondent to this summons is the administratrix of the deceased man and it is her duty to protect the estate so far as possible for the benefit of the creditors and, therefore, she has put forward the contention that the country solicitors have no right either to recover the sum of 399*l.* 19*s.*, or to prove against the estate.

The way the case is put on behalf of the applicants in the first instance is this. It is said that this 399*l.* 19*s.* was money which was paid to Mr. Sandiford for the express purpose of paying counsels' fees and that therefore it was money which came into his hands impressed with a trust, namely, to pay the fees to counsel, and that as that money can now be traced and has not been used for the only purpose for which it could properly be used, namely, the payment of counsel, the country solicitors are entitled to recover the actual amount.

In my judgment it is not possible in this case to say that the sum of 399*l.* 19*s.* was money paid to Mr. Sandiford impressed with a trust. I cannot disregard the fact that the account shows on the face of it that these fees had already been paid and it seems to me quite impossible to hold that when the country solicitors drew a cheque for the balance of this whole account they were paying over 399*l.* out of that total as money which was impressed with a trust at all. In my judgment this sum was only one of the items in the account, which was made up of various sums which appeared to be due to Mr. Sandiford as against sums which had been received or otherwise accounted for by him. On the face of it I am unable to come to the conclusion that this sum of 399*l.* was a sum which was paid over to the dead man with a trust to use it in any particular way. If these counsels' fees had in fact been paid before the account was rendered no question of any trust could have arisen, and the mere fact that the country solicitors may not have known for certain whether they had been paid or not cannot alter the position. This was an item which Mr. Sandiford was claiming as due to him which was paid on the footing that it was due to him and not subject to a trust at all. If that be so then it must follow that the application, so far as it asks for the repayment of the total sum of 399*l.* 19*s.*, is misconceived and must fail.

That, however, does not conclude the matter because there is the alternative claim that the applicants are entitled to prove for this sum, subject to the reduction, which I have mentioned. This is, of course, a totally different claim from the first. If this money was not impressed with a trust, it was paid to Mr. Sandiford as money due to him, whereas in truth and in fact the money was not due to him because he had not paid counsels' fees. It seems to me, therefore, that the country solicitors, if Mr. Sandiford had now been alive, would have been entitled to sue him, not to recover the 399*l.* 19*s.* as trust money in his hands, but to recover that amount on the footing that it was money had and received by Mr. Sandiford for their use, and if they could have proved their case they would have been entitled to judgment for the amount. If that be so it must follow that they have a right now to prove in the administration for that sum, not on the footing that it is trust money, but on the footing that it is money which was paid to Mr. Sandiford as money due to him from the country solicitors, whereas in truth and in fact that money was not due at all.

In my judgment it follows that the applicants are entitled to prove in the administration for the amount of 377*l.* 17*s.* 2*d.*, and I propose to make a declaration to the effect that the applicants are not entitled to payment of the 399*l.* 19*s.*, but that they are entitled to claim against the estate for the sum of 377*l.* 17*s.* 2*d.* As both sides in this summons have partly failed and partly succeeded there will be no order as to costs.

Solicitors for the applicants: *Watson, Sons & Room, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Solicitors for the respondent: *Edwin Coe & Calder Woods.*

P. J. B.

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March 20, 21, 22; April 18.

In re THE MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930.

MITCHELL MAIN COLLIERY COMPANY, LIMITED *v.* THE EXECUTIVE BOARD.

Mines—Coal Mines—Scheme under Coal Mines Act, 1930—*Annual Standard Tonnage—Arbitration—Seam—Working and Ventilation from adjacent shafts—*" *Coal Mine* "—*Coal Mines Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 34), *s.* 18, *sub-s.* 1—*Midland* (*Amalgamated*) *District* (*Coal Mines*) *Scheme,* 1930, *cl.* 2 (*d*).

By s. 18, sub-s. 1, of the Coal Mines Act, 1930: " In this Act . . . . ' Coal mine ' means any mine or open working where the getting of coal . . . . is the principal object of the mining or quarrying operations."

By cl. 2 (*d*) of the Midland (Amalgamated) District (Coal Mines) Scheme, 1930: " ' Coal Mine ' means any mine or open working in the district where the getting of coal is the principal object of the mining or quarrying operations."

In arbitration proceedings arising out of a fixation by the Executive Board under the scheme of a colliery company's annual standard tonnage, the arbitrator found (inter alia) that the company proposed to work the S. Seam in one of its collieries from a shaft in an adjacent colliery, that the S. Seam was to be approached by the deepening of that shaft and also by a shaft in the P. Seam, and that both shafts were to be used for ventilation and working. He found also that the coal from the S. Seam could be sold by the company at a higher average price in the competitive market and could be worked at a lower working cost than the coal from the other seams worked at the two collieries:—

Held, (1.) that the definitions of a coal mine in s. 18, sub-s. 1, of the Act and cl. 2 (*d*) of the scheme are not restricted and that the words " coal mine " as used in cl. 15 of the scheme (dealing with the Standard Tonnage Committee under the scheme) ought not to be narrowly construed.

(2.) that the S. Seam, under the conditions and circumstances of its proposed development, was a " coal mine " within the meaning of the scheme.

Moore & Co. v. *Macmillan* 1921 S. C. (J.) 9 considered.

SPECIAL CASE.

In this case there was before the Court an award stated in the form of a special case by an arbitrator under cl. 28 of the Midland (Amalgamated) District (Coal Mines) Scheme, 1930, which provides for arbitration under the scheme.

Mitchell Main Colliery Company, Ld. (hereinafter called

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" the company "), aggrieved by the fixation, by the Executive Board constituted under the scheme, of the annual standard tonnage of two collieries owned by it, referred the matter to arbitration. The arbitrator found (inter alia) the conditions and circumstances of the proposed development of a certain seam in one of the collieries, and the only question before the Court was whether that seam, under those conditions and circumstances, was a " coal mine " within the meaning of the scheme. After the conclusion of the argument the contentions of the parties were put into writing, at his Lordship's request.

The following statement of the facts is taken substantially from his Lordship's considered judgment :—

In the month of October, 1933, the Executive Board constituted under the Midland (Amalgamated) District (Coal Mines) Scheme, 1930 (which was approved by the Board of Trade pursuant to the powers conferred on them by s. 1 of the Coal Mines Act, 1930), and the Standard Tonnage Committee appointed under that scheme (hereinafter called " the scheme "), as the result of a revision carried out in the month of September, 1933, fixed the annual standard tonnage of the Mitchell Main and Darfield Main Collieries of the company, which are situated in the South Yorkshire Section of the Midland (Amalgamated) District, at 626,466 tons as from November 1, 1933. Sect. 1 of the Coal Mines Act, 1930, provides for schemes regulating production, supply and sale of coal, provides that schemes shall be effective under the Act only if approved or made by the Board of Trade, and empowers the Board of Trade to approve or make schemes. The company, being aggrieved by this fixation, referred the matter, under cl. 28 of the scheme, which provides for arbitration, to the arbitration of Sir Lynden Macassey K.C. In the arbitration proceedings the company contended that the Silkstone Seam at the company's collieries, in view of its proposed development, should be constituted a special coal mine, and as such should be given, under the provisions of cl. 15, sub-cl. 10, of the scheme, either a monthly standard tonnage or alternatively an annual standard tonnage. Clause 15, sub-cl. 10 (*a*), of the scheme provides: "In any case where the annual standard tonnage of a coal mine or undertaking cannot be ascertained in accordance with the provisions of sub-clause 8 of this Clause the Committee shall decide the basis of the standard tonnage and shall fix the same having regard to the special circumstances of such coal mine or undertaking." The Executive Board and the Standard Tonnage Committee contended that as a matter of law it would be contrary to the provisions of the scheme to treat the Silkstone Seam as a special coal mine and to deal with its standard tonnage in the way proposed by the company.

On December 28, 1933, the arbitrator stated his award in the form of a special case for the opinion of the Court under s. 7 of the Arbitration Act, 1889, the question being the question of law raised by the Executive Board and the Standard Tonnage Committee; that is to say, whether as a matter of law it would be contrary to the provisions of the scheme to treat the Silkstone Seam as a special coal mine. The term "special coal mine" is not a term used in the Act or in the scheme, but is a term commonly used to denote a coal mine the annual standard tonnage of which cannot be ascertained in accordance with the provisions of cl. 15, sub-cl. 8, of the scheme, which provides the method of fixing annual standard tonnages. The arbitrator found in Part V., para. 18, of the award (i.) that the company proposed to work the Silkstone Seam from the Mitchell Main No. 2 Shaft and also to sink the Darfield No. 3 Shaft to the level of the Silkstone Seam and to work the seam also from that shaft, and to sink a staple pit from a seam called the Parkgate Seam down to the Silkstone Seam at the Darfield Colliery for the purposes of ventilation; (ii.) that the coal from the Silkstone Seam could be sold by the company in the competitive market at a higher average price and could be worked at a lower working cost than the coal from the other seams worked at the Mitchell Main and Darfield Main Collieries; and (iii.) that, if the Silkstone Seam under the conditions and circumstances of its proposed development was a coal mine within the meaning of the scheme, its standard tonnage could not be ascertained in accordance with the provisions of cl. 15, sub-cl. 8, of the scheme. The result of the last finding is that it is only necessary to decide whether the Silkstone Seam, under the conditions and circumstances of its proposed development, is a coal mine within the meaning of the scheme.

Clause 2 (*d*) of the scheme provides that " 'Coal Mine' means any mine or open working in the district where the getting of coal is the principal object of the mining or quarrying operations." Counsel for the company submitted that the question should be answered as follows: "The Silkstone Seam, having regard to the facts found by the arbitrator in para. 18 of his award as to its proposed development, is in law capable of being treated as a special coal mine under the provisions of the Midland Scheme." Counsel for the Executive Board and the Standard Tonnage Committee submitted before me that the substantial question was as follows: "Whether there can be for the purposes of the scheme a separate coal mine or undertaking consisting of the Silkstone Seam when it is worked in the manner found by the arbitrator in Part V. (18.) (i.) and (ii.) of his award," and that the question should be answered as follows: "Having regard to the proposed working of the Silkstone Seam as found by the arbitrator in Part V. (18.) of his award, there cannot be, for the purposes of the scheme, a separate coal mine or undertaking consisting of the Silkstone Seam while so worked."

Hon. Sir Stafford Cripps K.C. and *Cyril J. Radcliffe* for the Executive Board. The Silkstone Seam has a drift in it and is going to be approached by the deepening of No. 3 shaft from the Darfield Main Colliery and an internal shaft staple pit, which is a shaft inside the mine itself, from the Parkgate Seam down to the Silkstone Seam. The question whether the Standard Tonnage Committee is right or wrong in refusing to deal with such a seam as the Silkstone Seam, as a new mine is a question of some importance under the scheme. The drift will be used as well as the shaft, and as

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well as the internal shaft from the Parkgate Seam, for ventilation and for working. "Mine" is defined in s. 75 of the Coal Mines Regulation Act, 1887 (1), and in s. 122 of the Coal Mines Act, 1911. (2) The word "mine" does not mean a separate seam of coal: *Thorpe* v. *Davies.* (3) In *Moore & Co.* v. *Macmillan* (4) it was held that the question whether two underground workings constituted one mine or two mines for the purposes of s. 4, sub-s. 2, of the Coal Mines Act, 1911 (requiring a separate under-manager to be appointed for each mine in all cases where a person is appointed manager of two or more mines required to be under the control of a manager) was a question, not of law, but of fact, to be determined upon a consideration of the whole concern with all its appliances and works. The Silkstone Seam, having regard to the fact that it was not found by the arbitrator to have a separate system of ventilation for its working or a separate shaft for raising coal got from it, cannot be treated as a coal mine for the purposes of the scheme.

N. L. C. Macaskie K.C., J. B. Herbert, and *T. Elder Jones* for the company. The authorities, especially *Moore & Co.* v. *Macmillan* (4), show that the Acts are peculiarly deficient in definitions of a "coal mine." The Coal Mines Act, 1911, and the Acts before it all dealt with the safe working of a coal mine, with the object of the safety of those working in the mine. The definition in that Act was evolved simply for the purposes of that Act. The Coal Mines Act, 1930, however, does not refer to the considerations which weigh in the Coal Mines Act, 1911. It is "an Act to provide for regulating and facilitating the production, supply and sale of coal by owners of coal mines," and the definition of "coal mine" in s. 18, sub-s. 1, was framed with that object in view. Presumably the Executive Board would like that definition to state that a coal mine is "any mine . . . . where the getting of coal . . . . is the principal object of the mining . . . . operations," provided always that it has a separate system of ventilation and a separate shaft for raising coal. But it is plain from s. 25, sub-s. 1, of the Coal Mines Act, 1911, that, even under that Act, one mine may be separated into two, and one part of it become a separate mine for purposes of the Act. (1) In *Moore & Co.* v. *Macmillan* (2) the Court took the view that the question what is a mine is a question of fact. Neither the fact that a seam shares a system of ventilation, nor the fact that it has one of its shafts separate, can, by itself, be conclusive on the question either way. All the facts must be considered. In the present case, it is in accordance with the provisions of the scheme that the Silkstone Seam, with its apparatus and appliances, shall be treated as a special coal mine. *Thorpe* v. *Davies* (3) does not help, for in the present case the Parkgate Seam and the Silkstone Seam were not going to be worked as one mine.

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(1) Sect. 75: "In this Act, ... 'Mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine:"

(2) Sect. 122: "In this Act, ... 'Mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine, but does not include any part of such premises on which any manufacturing process is carried on other than a process ancillary to the getting, dressing or preparation for sale of minerals."

(3) [1908] 2 K. B. 750.

(4) 1921 S. C. (J.) 9.

Cyril J. Radcliffe in reply. A seam is a stratum of coal in the earth. The difficulty in the present case is that the stratum of coal in the earth which is the Silkstone Seam cannot, on the arbitrator's findings as to the seam and as to the methods of working it, be treated as a coal mine for the purposes of the Coal Mines Act, 1930. The phrase "coal mine" has different meanings in different contexts. In documents and Acts dealing with compulsory rights and with

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(1) Sect. 25, sub-s. 1: "Where two or more parts of a mine are worked separately, the owner, agent, or manager of the mine may give notice in writing to that effect to the inspector of the division, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine:

Provided that, where each of such parts of a mine has not a separate system of ventilation, a mine shall not be so divided, except with the permission of the inspector of the division and subject to such conditions as he may prescribe."

(2) 1921 S. C. (J.) 9.

(3) [1908] 2 K. B. 750.

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the acquisition of mines and minerals, it might well refer to a single stratum of coal or to the chamber containing it, but it cannot do so in the Coal Mines Act, 1930. The word "seam" used in describing the Silkstone Seam must not be treated as including not only the seam of coal, but also a shaft which is held, and a ventilating apparatus which is used, in common with another seam or other seams.

Cur. adv. vult.

April 18. CROSSMAN J. [after stating the facts substantially as set out above:] In my judgment, the question which I have to answer is that stated by me above; that is to say, whether the Silkstone Seam, under the conditions and circumstances of its proposed development as found by the arbitrator, is a coal mine within the meaning of the scheme.

I was referred by counsel to the Coal Mines Regulation Act, 1887, and the Coal Mines Act, 1911 (which Acts may under s. 19 of the Coal Mines Act, 1930, be cited with that Act as the Coal Mines Acts, 1887 to 1930), and my attention was called to the definitions of the word "mine" in the Acts of 1887 and 1911. I was also referred to the case of *Thorpe* v. *Davies* (1), in which it was held that for the purpose of the appointment of a checkweigher under s. 13 of the Act of 1887 (a section which empowers the persons employed in a "mine" to appoint a checkweigher), the persons employed in one seam of a mine, which was not divided into separate mines under s. 19, sub-s. 1, of the Act of 1887 (providing for the division of a mine into parts), could not appoint a checkweigher in respect of that seam. I was also referred to the Scottish case of *Moore & Co.* v. *Macmillan* (2), in which it was held that the question whether two underground workings were to be regarded as one mine or as two mines for the purpose of s. 4 of the Act of 1911 (which imposes a limitation on the number of mines for which a manager may act) was not a question of law but one of fact, and that the question fell to be determined upon a

(1) [1908] 2 K. B. 750.

(2) 1921 S. C. (J.) 9.

consideration of the whole concern with all its appliances and works.

In my judgment the question in the present case is (like the question in *Moore & Co.* v. *Macmillan* (1)) a question of degree depending upon all the circumstances of the case. The definitions of "coal mine" in s. 18 of the Coal Mines Act, 1930, and in cl. 2 of the scheme, are not restricted in any way, and I can find no sufficient ground for putting a narrow construction on the expression as used in cl. 15 of the scheme. In my judgment the question which I have to answer should be answered as follows: The Silkstone Seam at the Mitchell Main and Darfield Main Collieries of the company, under the conditions and circumstances of its proposed development as found by the arbitrator in Part V., para. 18, of his award, is a coal mine within the meaning of the scheme.

I order that the Executive Board do pay the company's taxed costs of the special case.

Solicitors: *Vincent & Vincent, for Owen V. Smithson, Leeds; Andrew, Purves, Sutton & Creery, for Halmshaw & Wagstaffe, Barnsley.*

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(1) 1921 S. C. (J.) 9.

K. R. A. H.

EVE J.

1934

Feb. 19, 20,
21, 22, 28;
July 23.

In re RUSSO-ASIATIC BANK.

In re RUSSIAN BANK FOR FOREIGN TRADE.

[00471 of 1926.]

[00789 of 1932.]

Company—Winding-up—Foreign banking company with London branch—Action on bills of exchange drawn by company abroad—Acceptance by London banks—Payment in sterling at end of War—Acceptances assigned to Bank of England against Exchequer Bonds—Dissolution of company abroad in 1918*—English branch wound up as unregistered company—Proof by Bank of England in liquidation—Locality of debt—Statute of Limitations.*

In October, 1915, in order to rehabilitate Russian credit in London, an arrangement was made by the Bank of England, with the authority of the Treasury, under which approved Russian banks were to draw three months' sterling bills and remit them through the Banque de l'Etat, Petrograd, to London for acceptance by certain banks and accepting houses, who agreed to renew the bills until one year after the termination of the War, the Banque de l'Etat undertaking to provide to meet the acceptances on maturity. Imperial Russian Treasury Bills to the amount of the acceptances were to be lodged with the Bank of England as collateral security. No accepting house was to be liable for more than 100,000*l.*, unless otherwise agreed.

In pursuance of this arrangement the Russio-Asiatic Bank in 1916 drew 151 bills of exchange on twenty-one accepting houses maturing in February and March, 1918, which were presented through Baring Brothers & Co. as agents for the Banque de l'Etat and accepted by the banks and financial houses under a form of agreement with the Banque de l'Etat which carried out the above arrangement more completely; and authorized the issue by the Treasury of sterling Treasury Bills of the Imperial Russian Government to the amount of the acceptances to cover any default in payment on maturity.

In January, 1918, shortly before maturity, all the acceptances were assigned to the Bank of England in consideration of the issue of Exchequer bonds to the accepting houses to the amount thereof. Notice of the assignment was despatched by the Bank of England to the Russo-Asiatic Bank in Petrograd, but according to the evidence never reached its destination in consequence of the Bolshevist revolution in Russia. By a decree issued by the Soviet Government in December, 1917, all private banks in Russia were abolished and the whole of their assets transferred to a State Bank.

The Russo-Asiatic Bank, whose head office was in Petrograd, was one of the banks so abolished. Its London branch was opened in 1908 and was ordered to be wound up by the Court in 1926, under s. 338

of the Companies Act, 1929. The Bank of England, on behalf of the Crown, lodged a proof of debt in the liquidation for 752,500*l.*, proceeds of the above named bills. The liquidator rejected the proof of the Bank of England on several grounds, the most important being that the claim was barred by the Statutes of Limitation:—

Held, (1.) that the bills had been assigned to the Bank of England with the authority and on behalf of the Crown, and had passed to the Bank an equitable title to all the rights under the agreements made with the acceptors, including the right of action for breach of contract, if the bills were not paid at maturity; (2.) that the obligation being to pay in sterling in London at maturity the debt was located in England and not in Russia, and therefore English law must be applied; (3.) that the Russian Imperial Treasury bills were only a collateral security and being of no value at any material time were not a discharge of the debt; (4.) that on the evidence of experts and documents, the Russo-Asiatic Bank ceased to have any corporate existence in Russia as the result of decrees of the Soviet Government made on or before January 26, 1918, a date before the bills matured, and as from that date there was no debtor who could be sued. The Statute of Limitations therefore was no defence to the application, and the Bank of England was entitled to be admitted to prove for the debt in the winding-up of the London branch of the respondent bank. There being no evidence, however, that notice of the assignment had reached the drawers, the assignors must be joined in the application.

SUMMONS.

The following statement of facts is taken from the judgment of the learned judge.

The first of the two companies to which these proceedings relate was incorporated under the laws of Russia in the year 1895, under the name of the Russo-Chinese Bank. Its head office was at St. Petersburg. It first established a place of business in England in 1908, and in 1910 changed its name to the Russo-Asiatic Bank. On December 19, 1926, upon a petition presented on November 26, 1926, it was ordered to be wound up by the Court under the provisions of the Companies (Consolidation) Act, 1908. The respondent, Bernhard Heyman Binder, is the liquidator, and by this summons issued on November 21, 1933, the Attorney-General, on behalf of the Crown, seeks to review the rejection by the liquidator of the proof lodged on behalf of the Crown in the winding-up for 752,500*l.* and to have the proof allowed in full.

The alleged indebtedness arises in very exceptional circumstances. In the latter part of the year 1915 it was realized that some steps ought to be taken to rehabilitate Russian exchange in London, and that in order to attain this object funds would have to be provided in London for the purposes of exchange between Petrograd and London. In October, 1915, a document was prepared by or on behalf of the Bank of England embodying a suggested arrangement for giving effect to these proposals. The document is the exhibit S.D.W.1. It was thereby proposed that approved Russian banks—and that would seem to mean banks approved by the Banque de l'Etat, Petrograd—should draw three months' sterling bills on approved London banks and accepting houses, and sell the drafts to the Banque de l'Etat, Petrograd, that the Banque de l'Etat should forward the bills to London for acceptance and discount, the proceeds to be disposed of in London as the Banque de l'Etat might direct—that all bills drawn under the proposed arrangement should be marked on their face with the words: 'Drawn under credit arranged in Memorandum of 5th October, 1915, approved by the Banque de l'Etat, that the London banks and accepting houses should undertake to renew the bills (unless previously redeemed) until one year after the termination of the War, that the Banque de l'Etat would put the accepting banks and houses in funds to meet their acceptances under that agreement three clear days before maturity of the acceptances, that all bills bought by the Banque de l'Etat should be advised to the Bank of England and be regarded as A.1 bank bills for the purpose of discount or otherwise, and that Imperial Russian sterling Treasury bills due one year after the termination of the War to the amount of acceptances drawn under Imperial Ukase should be lodged with the Bank of England as collateral security for the engagement of the Russian banks to put the London banks and accepting houses in funds to meet their acceptances within one year of the termination of the War.'

These suggested arrangements proving to be acceptable to the Banque de l'Etat, they entered into agreements in January, 1916, with twenty-one banking houses carrying on business in the City of London in the form contained in the exhibit

S.D.W.2, and in March, 1916, agreements were made between the above-named Russo-Asiatic Bank and each of the said twenty-one banks in the form contained in the exhibit S.D.W.3. Each of these exhibits was issued from Petrograd. By the former, signed on behalf of the Banque de l'Etat, they were to be at liberty to present to the addressee for acceptance through their agents, Baring Brothers & Co., Ld., and the addressee was to accept bills drawn upon the addressee at three months' sight by the therein-mentioned Russian banks for the amounts therein placed against their respective names. Amongst the Russian banks were the Bank Russo-Asiatique, Petrograd, and the Russian Bank for Foreign Trade, the amount against their respective names being in each case 100,000*l.* The document went on to provide that as (that is to say, 'as and when') the bills were covered in cash, the Banque de l'Etat was to be at liberty from time to time to present to the addressee for acceptance through Baring Brothers & Co., Ld., and the addressee was to accept in renewal thereof further bills drawn by the said Russian banks upon the addressee at three months' sight and in like manner was to continue, upon any renewed bill being covered in cash, to accept further like bills; that the addressee was not to be under any obligation to accept bills or renewals maturing later than twelve months after the determination of the War; that the bills should bear on their face the words set out in the Memorandum of October 1, 1915, and that the addressee's acceptances under that arrangement outstanding at any one time should not, unless the addressee should otherwise agree, exceed the total sum of 100,000*l.*, and it was thereby stipulated that the addressee should be placed in funds from time to time by the said Russian banks through Baring Brothers & Co., Ld., to meet their respective bills and renewals in sterling in London three clear days before the date of maturity in each case, and should not be bound to accept any further bills or renewals unless so placed in funds, and the Banque de l'Etat guaranteed that if the said Russian banks should fail to place the addressee in funds in sterling in London to meet their respective bills and renewals three clear days before the date of maturity in each case, they would do so themselves, and as security for the due fulfilment of the obligation of the said Russian banks, were lodging with the Bank of England sterling Treasury bills of the Imperial Russian Government payable in London twelve months after the determination of the War to the amount in the case of the Russo-Asiatic Bank, of 100,000*l*., and in the unlikely event of the Treasury not being placed in funds to meet the acceptances or any of them at maturity, the Banque de l'Etat thereby authorized the Bank of England to issue to the addressee sterling Treasury bills of the Imperial Russian Government to the amount of the acceptances unprovided for, such Treasury bills to bear interest at 6 per cent. per annum from date of issue until payment, with liberty to the addressees to realize or otherwise deal with them or any of them at such time and in such manner as they should think fit.

By the exhibit S.D.W.3 each Russian bank undertook and agreed with each of the accepting banks, in consideration of their having entered into the arrangement with the Banque de l'Etat contained in exhibit S.D.W.2, to place the acceptors in funds in sterling in London through Baring Brothers & Co., Ld., to meet the bills and renewals three clear days before the date of maturity in each case. Two series of bills were accepted under these arrangements, but consequent upon the disturbed condition of affairs in Russia and of the uncertainty whether any of the Russian banks would provide funds for meeting the acceptances at maturity, great difficulty arose in carrying out the arrangements made by the three exhibits, to which I have already referred, and in December, 1917, the climax was reached when, by a Decree published on the 17th of that month, the Soviet Republic declared banking to be a state monopoly and all existing joint stock banks and banking houses amalgamated with the State Bank and the assets and liabilities of the liquidated banks taken over by the State Bank.

In reply to certain recommendations to the Treasury made on behalf of the Bank of England for averting the damage to the general credit of the country, which it was apprehended would result from the non-payment of the bills on the due dates, a letter was addressed to the Bank on January 18, 1918 (S.D.W.4), wherein the Treasury, after disclaiming any direct responsibility in regard to any of the outstanding bills, authorized the Bank to inform the acceptors of the bills drawn under the arrangement of October, 1915, that the Bank of England acting on behalf of His Majesty's Treasury: 'will be prepared to undertake now that when from time to time acceptances fall due the Bank will, to the extent that the acceptances are not provided for by the drawers on the Banque de l'Etat, deliver to the acceptors 3 per cent. Exchequer Bonds due 28th January, 1930, to the amount of such acceptances in exchange for the paid bills, the acceptors transferring to the Bank of England all their rights under or by virtue of the bills of exchange, including their right to call upon the Banque de l'Etat to fulfil its obligations under the agreement with the acceptors, on condition that the acceptors, for their part, agreed (1.) to follow all instructions and to afford all reasonable assistance that the Bank of England might at any time require; (2.) to take all such legal or other action against the drawers of the bills or any of them and against the Banque de l'Etat or any person concerned as and when so requested by the Bank of England or to allow such action to be taken in their names or on their behalf; and (3.) to hand to the Bank of England all acceptances when paid.' A warrant for the preparation and issue of the said Exchequer bonds dated January 21, 1918, was sent to the Bank of England on the 28th of the same month, and on the 21st each of the twenty-one accepting banks in writing transferred and assigned to the Bank of England all their rights, claims and demands against the drawers and the Banque de l'Etat and any other parties to such of the bills as might not be provided for by the drawers or the Banque de l'Etat, and under the arrangement for rehabilitating Russian exchange in London of October 1, 1915, and their agreement with the Banque de l'Etat made under that arrangement, and to hand to the Bank of England the bills as and when paid, the Bank of England in exchange for the bills not so provided for by the drawers or the Banque de l'Etat to hand to the transferors Exchequer bonds to the amount of such bills, and the transferors thereby authorized the Bank of England to use their names in any proceedings the Bank might think fit to institute to enforce such rights, and undertook to follow all instructions the Bank might give to them, and to afford all reasonable assistance to the Bank in relation to such proceedings, and not to take any action upon or in respect of the said bills, or the said arrangement, or arrangements, except as requested by the Bank. At the date of the said assignments none of the said bills had become payable. In the months of February, March, April and May, 1917, efforts were made to give notice to the Russian banks, including the Russo-Asiatic Bank, of the assignments, but owing to the suspension of the sending of correspondence by means of Foreign Office bags, and to the generally disturbed conditions in Russia, it is doubtful if service of any such notice was ever accomplished. Exhibit S.D.W.8 is a copy of the notice.

Early in March, 1918, a signed duplicate of the notice sent on March 15, and again on the 22nd, to the Banque de l'Etat was sent to Messrs. Baring Brothers & Co., Ld., with a request to them to forward it by post to its destination (see pages 25 to 30 of the correspondence, S.D.W.9). They expressed their willingness so to do as soon as postal communication with Petrograd had been restored. The notice sent by the Bank on March 22 never reached Petrograd. It was returned by the Post Office in the original covering registered envelope (unopened), and marked: 'Service suspended.' There is no evidence that the notices sent to Barings ever reached Petrograd. The bills were duly met and discharged by the acceptors out of their own moneys, and the fund for repayment of the moneys was provided by the Bank of England in accordance with the arrangements I have just read. The Treasury bills of the Imperial Russian Government deposited as collateral security for payment of the bills are not, and never were, of any value. The bills having been met no claim can be made thereunder, but there being some assets in the liquidation of the English branch of the Bank a proof was lodged in November, 1932. It is supported by an affidavit of Mr. Basil Gage Catterns, the chief cashier of the Bank of England, duly authorized by the Lords Commissioners of His Majesty's Treasury acting on behalf of His Majesty, and the Governor and Company of the Bank of England, agents or nominees of the said Lords Commissioners, in respect of the matters thereinafter mentioned, and is for a sum of 752,500*l.*, being the aggregate amount of 151 bills of exchange drawn by the Russo-Asiatic Bank on various banks therein mentioned, and by them accepted pursuant to arrangements made in the document of October 1, 1915 (S.D.W.1), and agreements made in pursuance of the said arrangements, between the Banque de l'Etat and the accepting banks (S.D.W.2), and between the Russo-Asiatic Bank and the other accepting banks (S.D.W.3). The proof goes on to state that as part of the arrangements under which the said bills were paid on maturity all the rights, claims and demands of the said several banks and accepting houses in respect of the said bills were transferred and assigned to the Governor and Company of the Bank of England as agents or nominees of the Lords Commissioners of His Majesty's Treasury (acting on behalf of His Majesty), who provided Exchequer bonds against delivery of the paid bills.

Evidence as to the effect of the decrees of the Soviet Government was given on both sides. Mr. Serge Konkevitch, a member of the Russian Bar, called on behalf of the Bank of England, said that in his opinion the Russo-Asiatic Bank ceased to exist as a legal entity and was dissolved as the immediate result of the decree of the Soviet Government of December 14, 1917, dissolving all joint stock banks. The present tense of the language of the decree indicated immediate action, and the assets and liabilities of the joint stock banks became vested ipso facto in the State Bank. The word translated " liquidation " was not used in its ordinary English sense. There was a statutory novation, and by another decree of January 20, 1918, all bank shares were annulled and the private banks were described as " late " or " former " banks.

On behalf of the liquidator Mr. Samuel Dobrin, a member both of the English and the Russian Bars, said that in his opinion the Russo-Asiatic Bank continued to exist as a legal entity so long as anywhere a single branch of it continued to function without having been ordered by the Soviet Government to close down or to become a State agency. The decree was a declaration of policy which became the title for the actual destruction of the joint stock and other private banks by executive act. The witness referred to the Instructions of the Soviet Government of December 10, 1918, as showing the machinery of nationalization in its working, and also to the judgments of the House of Lords in *Lazard Bros. & Co.* v. *Midland Bank, Ld.* (1) The bank continued in his opinion to exist as a legal entity, at least until the English branch was wound up by the Court in 1926.

Sir Thomas Inskip A.-G., *Wilfrid Lewis* and *A. Andrewes-Uthwatt* for the Bank of England. The Russo-Asiatic Bank was at the date of winding-up, namely on December 14, 1926, justly and truly indebted to the Bank of England, as agents and nominees of His Majesty's Treasury, in the sum of 752,500*l.* on bills of exchange drawn by the Russo-Asiatic Bank, for which the Bank of England has received no satisfaction. The Imperial Russian Sterling Treasury bills deposited with the Bank as collateral security are now and have at all material times been worthless.

The negotiations were conducted throughout by the Treasury, through the Bank of England, and the claim is not barred by the Statutes of Limitation. Time does not run against the Crown, and therefore it does not run against the Bank of England as its agents and trustees: Chitty on the Prerogative of the Crown (ed. 1820 at p. 383); Lightwood's Time Limit on Actions, p. 224.

The operation of the statute during the Crown's ownership of the debt is suspended: *Lambert* v. *Taylor*. (2) If at the time of the assignment of the debt to the Crown the statute has not run, then it ceases to run: *Perry* v. *Eames*. (3) The moment

(1) [1933] A. C. 289.

(2) (1825) 4 B. & C. 138.

(3) [1891] 1 Ch. 658, 668.

the money was raised and paid by the Treasury the beneficial interests of the accepting houses became vested in the Crown, and the Crown is not barred. There is no reason for confining this doctrine to purely legal interests; it applies equally to equitable rights: *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade.* (1)

The other question in the case relates to the date when the Russo-Asiatic Bank ceased to exist as a legal entity. If, as is submitted, the Russian private banks were abolished by the Soviet decree of December 14, 1917, then there was no debtor who could be sued and the statute never began to run: see the Companies Act, 1929, s. 338; *Russian and English Bank* v. *Baring Brothers & Co., Ld.* (2) According to the evidence of Mr. Konkevitch as to the effect of dissolution in Russian law the Russo-Asiatic Bank was abolished, together with other private banks, as the immediate result of the decree of December, 1917. Since then the bank has ceased to exist in Russia and elsewhere de jure and de facto. The word in the decree translated "liquidation" means abolition. The whole of the property in the banks passed to the State Bank, and all that was left was a matter of accountancy: see *Lazard Bros. & Co.* v. *Midland Bank, Ld.* (3), in particular, the judgments of Scrutton L.J. and, in the House of Lords, of Lord Wright; *In re Russian Bank for Foreign Trade.* (4)

A decree of the Soviet Government could not affect a debt situate in England: *Douglas* v. *Forrest* (5); *Musurus Bey* v. *Gadban.* (6) There must be some debtor in existence against whom an action can be brought, and if our submission is right there never was any one who could be sued by the assignors.

On both those grounds the Crown is not bound by the statute. The bills of the then Imperial Russian Government were deposited with the Bank of England as collateral security and could not be a satisfaction of the debt.

[Counsel also referred to *Russian Commercial and Industrial*

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(1) (1931) 48 Times L. R. 37.
(2) [1932] 1 Ch. 435.
(3) [1932] 1 K. B. 617; [1933] A. C. 289.
(4) [1933] Ch. 745.
(5) (1828) 4 Bing. 686.
(6) [1894] 2 Q. B. 352, 357.

Bank v. *Comptoir d'Escompte de Mulhouse* (1) and *Banque Internationale de Commerce de Petrograd* v. *Goukassow.* (2)]

Lionel Cohen K.C. and *Dr. V. R. Idelson* for the liquidator. The bills matured, as to some, on February 3, 1918, and as to the rest on March 25, 1918. If the Russo-Asiatic Bank was not dissolved on or before March 25, 1918, this point disposes of the case, for subsequent dissolution abroad would not stop the statute from running.

To this argument the Attorney-General has set up two defences: (i.) the decision in *Perry* v. *Eames* (3), (ii.) that there must be some one to be sued on the debt. We submit that, having regard to the authorities, it is impossible to contend that the Bank was not still in existence on March 25, 1918. The effect of the evidence of Mr. Dobrin for the liquidator is that dissolution in Russian law was a gradual process, and did not become finally effective until August 3, 1921. The bank was absorbed into the State Bank, but was not abolished. There is a plain unambiguous clause in the decree of December 14, 1917, which shows that its assets and liabilities were then taken over by the State Bank. The legal relations between the acceptors and the Russo-Asiatic Bank were situate at the Bank's office at Petrograd and were transferred to the State Bank. The authorities show that when there is a conflict of evidence as to the effect of foreign law on the case the Court is entitled to examine the code and to form its own opinion: *Concha* v. *Murrieta* (4); *Di Sora* v. *Phillipps.* (5) When bills have been drawn, accepted and indorsed under an elaborate arrangement wholly contained in a set of written documents, the parties are bound by the contract they have entered into. The whole question is as to the obligation assumed by the Russo-Asiatic Bank in these documents. The remedy under the memorandum of October, 1915 (S.D.W.3), was an action not for debt but for breach of contract.

The assignment to the Bank of England does not include the benefit of the covenant under the document S.D.W.6.

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(1) [1925] A. C. 112.

(2) [1923] 2 K. B. 682; [1925] A. C. 150.

(3) [1891] 1 Ch. 658.

(4) (1889) 40 Ch. D. 543.

(5) (1863) 10 H. L. C. 624.

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The accepting houses had to meet payment of these bills out of their own funds. The Bank of England and the Treasury are at the most in the position of equitable assignees, and the claim must therefore be treated as if it were a claim of the acceptors. The relation between the Bank of England and the Crown is that of trustee and cestui que trust; the Bank are not agents for an undisclosed principal: see *In re Steel Wing Co., Ld.* (1); *Williams* v. *Atlantic Assurance Co.* (2); *Roxburghe* v. *Cox* (3); *Rhodes* v. *Smethurst* (4); *Perry* v. *Eames.* (5)

The interpretation of a bill of exchange is governed by the law of the country where the contract is made, which in this case is Russia, the only exception to this rule being that where an inland bill is indorsed in a foreign country, the indorsement is interpreted by the law of the United Kingdom: see Bills of Exchange Act, 1882, s. 72; Byles on Bills, 18th ed., at p. 307; *Alcock* v. *Smith* (6); *Allen* v. *Kemble.* (7)

The memorandum of October, 1915 (S.D.W.3), is a document purporting to define the extent of the liability between drawer and acceptor, arising from the factor that the bills were accommodation bills. It was signed in Petrograd, and the London branch of the Bank had no concern with the matter. The document contemplated the remission by the head office through the Banque de l'Etat and Baring Brothers & Co., Ld., of sterling funds to meet the bills. The remedy for the failure to perform this obligation is an action for damages.

There are no entries relating to the transaction to be found in the books of the London branch of the Bank, and no notice of failure to pay when due was ever given to the London branch, only sent to Petrograd.

The debt is a simple contract debt, and is therefore situate where the contract was made, in Russia: see *Attorney-General* v. *Bouwens* (8); *English, Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners* (9); *New York*

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(1) [1921] 1 Ch. 349.
(2) [1933] 1 K. B. 81, 100.
(3) (1881) 17 Ch. D. 520.
(4) (1840) 6 M. & W. 351.
(5) [1891] 1 Ch. 658.
(6) [1892] 1 Ch. 238.
(7) (1848) 6 Moore P. C. 314.
(8) (1838) 4 M. & W. 171.
(9) [1932] A. C. 238.

Life Insurance Co. v. *Public Trustee.* (1) *Rex* v. *Lovitt* (2) is distinguishable from the present case.

In *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (3) the contracts sued on were held to be English and not French, and therefore were not discharged by liquidation in a foreign country: *Perry* v. *Equitable Life Assurance Society of the United States.* (4)

Whatever might be the Russian law, the company still continued to exist in England, for it could be and has been wound up as an unregistered society under s. 338 of the Companies Act, 1929. If the company existed here it could be sued here, and so it cannot reasonably be contended that there was no debtor in existence who could be sued, and that the statute could not run. The idea of a branch surviving in England, though the main stem has been cut down in its native country, is not new in English law: *Dresdner Bank (London Agency)* v. *Russo-Asiatic Bank* (5); *Lazard Brothers & Co.* v. *Midland Bank, Ld.* (6); *Russian and English Bank* v. *Baring Brothers & Co.* (7); *Russian Commercial, &c., Bank* v. *Comptoir d'Escompte de Mulhouse.* (8) In the latter case the Russian bank had no property outside Russia.

The decree of December 14, 1917, is a declaration of policy, not a positive command which must take immediate effect: *Embericos* v. *Anglo-Austrian Bank* (9); *Koechlin et Cie* v. *Kestenbaum Brothers.* (10)

Summing up, we contend (1.) that there is no room for any implied contract, as the rights and liabilities between drawer and acceptors are fully defined by the memorandum referred to as S.D.W.3; (2.) on the true construction of the assignment S.D.W.6, all the rights in S.D.W.3 were not comprised in it; (3.) but if they were comprised in S.D.W.6, then the only right which vested in the Bank of England on behalf of the Crown was to receive the Russian Treasury bills, and these they have received; (4.) alternatively, before the assignment to the Bank of England the liability of the Russo-Asiatic Bank had been discharged by transfer to the State Bank at Petrograd by the decree of December 14, 1917 ; (5.) in further alternative, under that decree it became impossible and illegal for the Russo-Asiatic Bank to perform its obligations under S.D.W.3, and therefore it was discharged from further performance of the contract ; (6.) in any event the assignment to the Bank of England was an equitable assignment, and any defence available against the acceptors is also available against the Bank, and therefore the Statute of Limitations is a complete defence to the claim.

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(1) [1924] 2 Ch. 101.
(2) [1912] A. C. 212.
(3) (1890) 25 Q. B. D. 399.
(4) (1929) 45 Times L. R. 468.
(5) [1923] 1 Ch. 209.
(6) [1932] 1 K. B. 617.
(7) [1932] 1 Ch. 435.
(8) [1925] A. C. 112.
(9) [1904] 2 K. B. 870.
(10) [1927] 1 K. B. 889.

van den Berg K.C. and *H. S. G. Buckmaster* for the Russian Bank for Foreign Trade. The same principles apply in this case, but the Bank of England's claim is to prove in the liquidation for 920,000*l.* We adopt Mr. Cohen's argument. We have not filed any evidence in opposition, but if the Court accepts Mr. Dobrin's evidence, it is equally applicable to the present case.

This is not an ordinary case of liquidation. The jurisdiction of the Court is only over the London branch of the Russian Bank, and it would have had no jurisdiction if the bank had never carried on business in Great Britain. The debt must be deemed to be in Russia for these reasons : (i.) the locality of the debt of a bank with several branches is the place where it is to be discharged ; (ii.) on the true construction of the documents the debt was an obligation of the head office ; (iii.) the contract was made in Russia, and no negotiations were ever carried on through the branch house in London. The transaction was a most unusual one, not within the competence of the London branch, and no mere banking transaction, but a scheme for the restoration of Russian credit. The bills were on Russian paper and were signed in Petrograd.

New York Life Insurance Co. v. *Public Trustee* (1) is distinguishable on the facts. The liquidator can only collect the assets and pay the debts of the London branch, and it would be most inequitable to compel him to pay the debts of the head office out of the assets available in London. There

(1) [1924] 2 Ch. 101.

cannot be creditors of the corporation as such, as it has no existence in Russia. If the debt still exists in Russia then it has been transferred to the State Bank by a statutory novation.

On the documents there is no trace of the Crown as an interested party. The memorandum of the Treasury (S.D.W.4) merely informs the Bank of England of the intentions of the Government. Neither the assignment nor the notice of the assignment mention the Crown. The case is not affected by any private arrangement between the Crown and the Bank of England ; it is res inter alios acta.

Sir Thomas Inskip A.-G. in reply. We are not suing on the bills of exchange, but on the obligation assigned to us by the document S.D.W.6, containing and embracing the terms of the memorandum S.D.W.3. The language of the latter document—" In consideration of your agreeing at our request "—shows that an indemnity was intended, and it contains an express indemnity. The effect is to create an obligation to place the accepting houses in sterling funds at the due date in London.

If notice to the drawers had been given and received, there would clearly have been an absolute legal assignment of the debt to the Bank of England, as trustees for the Crown. But we cannot prove that the notice sent ever reached the Russian banks, and therefore rely on the equitable assignment : *William Brandt's Sons & Co.* v. *Dunlop Rubber Co., Ld.* (1) ; *Williams* v. *Atlantic Assurance Co.* (2)

On the point of the Statute of Limitations, we contend that the statute never even began to run. Even though the legal title were to remain in the assignors, the statute would be no defence.

Unless the bank, as we submit it did, ceased to exist as a corporate body as a result of the decree of December 14, 1917, then it is still in existence and capable of being sued. These are the only logical alternatives : see *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (3) ;

(1) [1905] A. C. 454, 462.

(2) [1933] 1 K. B. 81.

(3) [1925] A. C. 112, 141.

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In reply to the contention that the debt, being locally situate in Russia, was destroyed by Russian law on the principle of frustration, the obligation was to provide sterling funds in London to meet the bills when they became due. That obligation could not be enforced in Russia, so that the residence of the debtor is immaterial. The proper law of the contract, to which both parties intended to submit, is English law, and the fact that the head office of the debtors is in Moscow is of no consequence whatever: Dicey on Conflict of Laws, 5th ed., pp. 628, 669.

Cur. adv. vult.

July 23. EVE J. [after stating the facts, proceeded:] The first point raised by the respondent was that the arrangement was one which concerned the Bank of England, and that the Crown was really not interested therein; but the uncontradicted statements in para. 3 of the affidavit of Mr. Sigismund Waley, Principal Assistant Secretary to the Treasury, filed on November 8, 1933, wherein he deposes that by a letter dated January 18, 1918 (S.D.W.4), the Lords Commissioners of His Majesty's Treasury, acting on behalf of His Majesty, authorized the Governor and Company of the Bank of England, on behalf of His Majesty, to accept from the said twenty-one banking houses assignments of the respective rights of the said banking houses, and in consideration of the said assignments to issue to the said twenty-one banking houses Exchequer Bonds, effectually disposed of this point.

It was then argued that the assignments executed in pursuance of that authority did not pass to the Crown or to the Bank of England on behalf of the Crown, the rights under S.D.W.3—it being assumed, and, as I think, rightly, that in a case like this, where the respective rights are the subject-matter of an elaborate arrangement reduced into writing, recourse to general principles is not open to the parties—they are bound by the documents into which they have entered, and there is no room for implications. The point resolves itself into a question of construction. Did the assignment S.D.W.6 include the right of action, that is, an action to recover damages for breach of contract under S.D.W.3? I think it did. The language of the concluding part of the first paragraph: "All our rights, claims and demands against the drawers and the Banque de l'Etat and any other parties to the said bills and under the above arrangement"—that is the arrangement embodied in the document of October 1, 1915—"and our agreement with the Banque de l'Etat made under that arrangement," is, in my opinion, sufficient to include all the rights of action under S.D.W.3, and the rest of the document S.D.W.6 strongly supports this view; it is directed expressly to proceedings to enforce such rights. But although the adoption of the construction contended for by the respondent might, indeed I think would have disposed of the claim of the Bank as agent or trustee for the Crown, the construction I have adopted does not do more than give them an equitable title only. They could not recover without joining the acceptors as parties, and in these circumstances they are willing to let the claim be dealt with on the footing that before it is finally disposed of the assignors must be before the Court.

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(1) [1923] 2 K. B. 682.

(2) [1908] 2 Ch. 715; [1910] A. C. 262.

(3) [1933] Ch. 745.

I ought perhaps, before dealing with the point arising under S.D.W.3 and S.D.W.6, to have directed attention to the various grounds on which the respondent relies as justifying his rejection of the proof. Several grounds of objection have been put forward, but Mr. Cohen is content to confine himself to some of those contained in one or other of the two notices dated December 13, 1933, and January 23, 1934. What I have so far dealt with is covered by paras. 2 and 5 of the earlier notice and paras. 3, 4, and 5 of the later one. Paras. 1 and 7 of the former and para. 1 of the latter are not insisted upon and there survive paragraphs which raise the following points: (*a*) that the liabilities of the drawer of the bills referred to in the proof of debt are governed by Russian law; (*b*) that the agreements between the Russo-Asiatic Bank and the English banks became impossible of performance and the debts thereunder were discharged by the operation of Russian law: (*c*) that under the agreements between the Banque de l'Etat and the various accepting banks and houses it was agreed that in the events that have happened sterling Treasury bills of the Imperial Russian Government would be accepted in full satisfaction of the indebtedness of the Company to the accepting banks and houses; and (*d*) that the only effect, therefore, of the purported assignment in favour of the Crown can be the vesting in the Crown of the right to demand from the Bank of England the said Treasury bills; and last, but by no means least, that the amounts claimed in the proof were barred by the Statute of Limitations.

No evidence has been tendered in support of the alleged agreement on the part of the acceptors to accept in the events which happened the Treasury bills of the Imperial Russian Government in satisfaction of the indebtedness of the Banque de l'Etat to the accepting banks and houses. Such bills, as I have already indicated, never had any value, and by an Order duly made by the Department of Local Institutions of the People's Bank of the Russian Socialist Federal Soviet Republic on April 16, 1918, it was declared that they were out of circulation and that no payment of the same could be allowed. Apart, however, from this, it is, I think, quite plain that they were lodged with the Bank of England as collateral security for the engagement of the Russian banks to put the London banks and accepting houses in funds to meet their acceptances within one year of the termination of the War (para. 7 of S.D.W.1). This conclusion disposes, I think, of the objections raised in paras. (*c*) and (*d*).

There still remain for consideration the allegations (1.) that the liability of the drawers of the bills referred to in the proof is governed by Russian law, which by its operation has discharged all the said liabilities or alternatively has vested them in the Russian State; and (2.) that the amounts claimed in the proof are barred by the Statute of Limitations. The answer to the former of these questions depends on the construction of the contract between the drawers and acceptors of the bills, and in this connection the fact that the bills were paid by the acceptors and that no action can be brought upon them must not be lost sight of; and although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London. I think the law to be applied is the English and not the Russian law.

The answer to the second of the above questions depends upon the date to which the dissolution of the Russian banks is to be assigned. This is a question of fact, and I have been assisted in an attempt to arrive at a right conclusion by the evidence-in-chief, and under cross-examination, of the well known and highly qualified experts whose evidence has been a feature of many previous trials, by reference to a series of documents emanating from acquisitive bodies identified with the Soviet Government, and an exhaustive citation of all the reported and some unreported cases wherein the point has been fully discussed. One cannot, I think, apply one's mind to these materials without appreciating that they disclose a gradual inclination towards the opinion which Mr. Konkevitch has repeatedly expressed, that the joint stock banks ceased to possess a juristic personality in December, 1917, or at the latest in January, 1918. I accept that view, and I hold that corporate existence of the respondent Bank ceased on or before January 26, 1918. The result is that the Statute of Limitations has no application and the applicant is, in my opinion, entitled to be admitted to prove as a creditor in the winding-up. The costs of all parties will be paid out of the assets. There will be general liberty to apply. A similar order will be made in the other case.

Solicitors: *The Treasury Solicitor; Gilbert Samuel & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

H. L. L.

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